

Standing by Your Man Ray: Troubles with Antitrust Standing in Art Authentication Cases

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INTRODUCTION

In 1989, Joe Simon-Whelan, an intimate of Andy Warhol, purchased one of the artist's silk-screened self portraits for \$195,000.¹ Fred Hughes, the chairman of the Andy Warhol Foundation for the Visual Arts, signed an authentication of the portrait, certifying that it was genuine.² In 2001, Simon-Whelan's investment appeared prescient: a buyer was prepared to part with \$2,000,000 in exchange for the painting.³ However, members of the Andy Warhol Art Authentication Board, an entity created eight years after the Foundation, encouraged the buyer not to purchase the portrait until the Board had authenticated it.⁴ After Simon-Whelan eventually submitted the painting to the Board, the Board denied that Andy Warhol had authored the artwork.⁵ The Board invited Simon-Whelan to resubmit his silk-screen with additional documentation; Simon-Whelan did, and the board denied the portrait's authenticity a second time.⁶

This denial of authenticity may seem innocuous. After all, connoisseurship is a rarified and contentious art, and disagreements about the authorship of artworks can persist for decades.⁷ But more is at stake than expert opinion. Art

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1. Michael Shnayerson, *Judging Andy*, VANITY FAIR, Nov. 2003, at 201.

2. *Id.* The Warhol Foundation was created in 1987 pursuant to Warhol's will. *Id.*; *Entity Information, The Andy Warhol Foundation For The Visual Arts, Inc.*, N.Y. STATE, DEPT. OF STATE, DIV. OF CORPS., available via http://www.dos.ny.gov/corps/bus_entity_search.html (last visited Nov. 26, 2013). Throughout this Note, it is assumed that "genuine" and "not genuine" are labels that can be definitively affixed to works of art. This assumption is in line with the practices of art authentication boards, even if the meaning of "authenticity" is slippery at best, and even sometimes nonexistent (or at least irrelevant). See WALTER BENJAMIN, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS 224, 224 n.2 (Harry Zohn trans., 1969) ("From a photographic negative, for example, one can make any number of prints; to ask for the 'authentic' print makes no sense. . . . Precisely because authenticity is not reproducible, the intensive penetration of certain (mechanical) processes of reproduction was instrumental in differentiating and grading authenticity.")..

3. Shnayerson, *supra* note 1, at 201.

4. *Id.*; see also Amended Class Action Complaint at ¶¶ 149, 151, Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., No. 07-CV-6423(LTS) (S.D.N.Y. Oct. 19, 2007); *Entity Information, Andy Warhol Art Authentication Board*, N.Y. STATE, DEPT. OF STATE, DIV. OF CORPS., available via http://www.dos.ny.gov/corps/bus_entity_search.html (last visited Dec. 9, 2013)..

5. Amended Class Action Complaint, *supra* note 4, at ¶ 155.

6. *Id.* at ¶ 165.

7. See generally THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS

authentication boards wield tremendous power over the art market: authenticated works by important artists have considerable value, while a work denied authentication can be virtually impossible to sell.⁸ Additionally, common practices among authentication boards can open them up to controversy. Board members often have a financial stake in the market for an artist's works, largely because boards are populated with the people most knowledgeable about a given artist, who tend to be his or her collectors or family members.⁹ Owners of an artist's works have an obvious conflict of interest in making authenticity determinations about that artist. The fewer genuine works of a particular artist available, the more valuable each authenticated work becomes.

The Andy Warhol Art Authentication Board has been a particularly frequent subject of criticism, partly because of its dealings with Simon-Whelan, and partly for other high profile decisions.¹⁰ People with a financial interest in the sale of Warhol's oeuvre sat on the Authentication Board at the outset of its existence,¹¹ and at the end of Simon-Whelan's dealings with the Board, at least one employee of the Andy Warhol Foundation for the Visual Arts sat on the Board.¹² The conflicts of interest between the Board-as-authenticator and the Foundation-as-collector created especially bad incentives in determining authenticity, since the Foundation owned about \$500,000,000 worth of Warhol's artwork. Because

IN THE VISUAL ARTS (Ronald D. Spencer ed., 2005). Spencer's book argues in large part that those who determine authenticity of artworks should be shielded from liability. *Id.* The editor was, perhaps coincidentally, the legal representative of the Andy Warhol Art Authentication Board. Amended Class Action Complaint, *supra* note 4, at ¶ 72.

8. *Cf. Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 95 (N.Y. App. Div. 2009), *appeal denied*, 933 N.E.2d 216 (N.Y. 2010) (accepting plaintiff's contention that failure to include a sculpture in Alexander Calder's catalogue raisonn  rendered the artwork "essentially unmarketable").

9. *See, e.g., Dick Grant, Panel 2: The Rights and Responsibilities of Authenticating Art*, 35 COLUM. J.L. & ARTS 393, 416 (2012) ("[O]ur authentication committee's primary members are the three family members of [abstract expressionist] Richard Diebenkorn.").

10. *See, e.g., Eileen Kinsella, The Brillo-Box Scandal*, ARTNEWS (Nov. 1, 2009), <http://www.artnews.com/2009/11/01/the-brillo-box-scandal> (detailing Board's failure to reevaluate clearly erroneous grant of authenticity to several Brillo Boxes falsely attributed to Warhol); Adrian Levy & Cathy Scott-Clark, *Warhol's Box of Tricks*, GUARDIAN (Aug. 20, 2010), <http://www.guardian.co.uk/artanddesign/2010/aug/21/warhol-brillo-boxes-scandal-fraud> (coupling the Brillo scandal with allegations of Board's vindictiveness and inaccuracy); Eileen Kinsella, *The Trouble With Warhol*, ARTNEWS (Apr. 1, 2011), <http://www.artnews.com/2011/04/01/the-trouble-with-warhol> ("In the 15 years since the authentication board was created, it has frequently come under fire for what some observers have considered secretive, arbitrary, or biased decision making."); Shnayerson, *supra* note 1, at 196 ("In the netherworld of great artists' estates, some panel of experts is usually on tap to determine the authenticity of once humble paintings that now sell for millions of dollars. They may debate, they may equivocate. None, though, has seemed so capricious as the Andy Warhol board."). The denial of authenticity to Simon-Whelan's portrait has even inspired its own art exhibition, *Warhol Denied*. *See generally* CHARLES LUTZ PRODUCTIONS, <http://www.warholdenied.com> (last visited Nov. 17, 2013).

11. Shnayerson, *supra* note 1, at 211; Amended Class Action Complaint, *supra* note 4, at ¶ 8.

12. Kate Taylor, *Is Authentication a Game of Monopoly?*, N. Y. SUN, Oct. 5, 2007, at 16 ("A recent article in the New York Times quoted the Warhol Foundation's chief financial officer, K. C. Maurer, as stating that the foundation is wholly separate from the authentication board, but that is not true. One of the board's five members, Sally King-Nero, is also an employee of the foundation."); *see also* Amended Class Action Complaint, *supra* note 4, at ¶ 70 (naming four people who work simultaneously for the Board and the Foundation).

Warhol was such a prolific artist, the impression that his work is scarce would likely have a more dramatic impact on his prices than on those of an artist whose works are genuinely scarce.¹³

After the second denial of authenticity, Simon-Whelan sued the Board, the Foundation and others.¹⁴ He alleged a conspiracy in restraint of trade, in violation of section 1 of the Sherman Act, and he alleged that the Foundation either had monopolized or attempted to monopolize the market for artwork by Andy Warhol, in violation of section 2 of the Sherman Act.¹⁵ The defendants moved to dismiss the complaint for failure to state a claim on which relief could be granted; the court denied the motion.¹⁶ It was the first time that an antitrust claim based on art authentication practices survived a motion to dismiss.¹⁷ Simon-Whelan's claim settled before trial, precluding appellate review.

In order to state an antitrust claim, a plaintiff must allege with some particularity: "(1) a violation of antitrust law; (2) injury and causation; and (3) damages."¹⁸ Additionally, a plaintiff must demonstrate that she has "antitrust standing," a requirement distinct from standing under Article III of the Constitution (though that of course must be satisfied as well).¹⁹ In *Simon-Whelan v. Andy Warhol Foundation for the Visual Arts, Inc.*, the court held that the plaintiff lacked standing on his claim of conspiracy to inflate the prices of art by Warhol (the section 1 claim) because he did not purchase artwork from the defendants.²⁰ The court held that Simon-Whelan had standing on his monopolization claim (the section 2 claim)—since he intended to sell the painting, he was a potential competitor with the Foundation in the market for Warhol's art.²¹

This Note examines the doctrine and policies of antitrust standing and their interaction with the art market. Part I explains why art authenticators may find

13. In the Matters of Determination of Legal Fees Payable by Estate of Warhol, No. 824/87, 1994 WL 245246, at *1 (N.Y. Sur. Ct. Apr. 14, 1994). In that litigation, the Foundation argued that its holdings were worth \$103,353,738, discounting to present value the amount for which it believed it could sell its holdings. *Id.* The court characterized the valuation as "based on selective and limited use of the available data and . . . otherwise prepared without regard to the governing legal principles." *Id.* at *1-2. For more on the importance of scarcity in the art market, see DON THOMPSON, *THE \$12 MILLION STUFFED SHARK: THE CURIOUS ECONOMICS OF CONTEMPORARY ART* 64 (2008); for a discussion of stakeholders' differing opinions about how flooding the market with minor Warhol works will affect prices, see Robin Pogrebin, *Foundation Aims to Sell or Donate All Its Warhols*, N.Y. TIMES, Sept. 6, 2012, at C7.

14. Amended Class Action Complaint, *supra* note 4.

15. *Id.* at ¶¶ 211-226.

16. *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, No. 07-CV-6423(LTS), 2009 WL 1457177, at *6, *9 (S.D.N.Y. May 26, 2009).

17. Gareth S. Lacy, *Standardizing Warhol: Antitrust Liability for Denying the Authenticity of Artwork*, 6 WASH. J. L. TECH. & ARTS 185, 191 (2011).

18. *In re Ethylene Propylene Diene Monomer Antitrust Litig.*, 256 F.R.D. 82, 87 (D. Conn. 2009) (quoting *Cordes & Co. Fin. Services, Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 104105 (2d Cir. 2007)) (internal quotation marks omitted).

19. See *infra* Part I.B for a discussion of the requirements of antitrust standing.

20. *Simon-Whelan*, 2009 WL 1457177, at *8. The court also dismissed this claim for falling outside of the statute of limitations. *Id.*

21. *Id.*

themselves defendants in antitrust suits. It then describes the legal rules of antitrust standing propounded by the Supreme Court, interpreted (in wildly divergent ways) in the Circuits, applied in *Simon-Whelan* and discussed in scholarly literature. Part II surveys the market for modern art and the courts' relationship to it. Part III argues first that the *Simon-Whelan* court engaged in the wrong antitrust standing analysis as a matter of doctrine, and that the court should have followed the Second Circuit's precedent, which does not look to the plaintiff's status as a consumer or competitor in the relevant market (the "consumer-or-competitor test"). Second, even if the consumer-or-competitor test were the appropriate inquiry in the Second Circuit, the *Simon-Whelan* court applied it incorrectly: the court held that the plaintiff lacked standing because he was not a consumer who purchased from the defendant, when the correct question is whether he was a consumer in the relevant market. Finally, Part III argues that the goal of antitrust standing should be to identify the plaintiff best suited to enforce the antitrust laws without risking multiple recoveries from the defendant for a single violation, and that the art context does not alter courts' traditional institutional competence in adjudicating disputes between parties and in finding facts that may support or undercut asserted violations of antitrust laws.

Art cases occur most frequently in the state and federal courts in Manhattan, and the cases tend to rely on one another regardless of the substantive area of law involved.²² Because this area of litigation is highly concentrated and self-referential, and because *Simon-Whelan* offers a precedent for a successful antitrust claim, the case presents a risk that other courts will compound its errors. This Note offers a framework for an antitrust standing analysis that allows suits by plaintiffs who are best positioned to vindicate the goals of antitrust laws in the context of an increasingly significant area of case law and scholarship—art authentication.

I. THE LEGAL LANDSCAPE OF ANTITRUST CASES IN ART AND ANTITRUST STANDING

Disappointed by refusals to authenticate, owners of art have brought antitrust suits against people and entities that the art market trusts to make authenticity determinations, such as art authentication boards ("Boards"). Boards, as their name implies, determine whether or not a given work of art may genuinely be attributed to an artist. Boards are typically associated with one particular artist, and generally each artist only has one Board that authenticates her work.²³ Boards' authenticity

22. See, e.g., the product disparagement case *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 105 (N.Y. App. Div. 2009), *leave to appeal denied*, 933 N.E.2d 216 (N.Y. 2010) (citing the slander of title case *Hahn v. Duveen*, 133 Misc. 871 (N.Y. Sup. Ct. 1929)); *Thome*, 70 A.D.3d at 111 (citing the monopolization case *Simon-Whelan*, 2009 WL 1457177); *Simon-Whelan*, 2009 WL 1457177, at *6 (citing the essential facilities case *Kramer v. Pollock-Krasner Foundation*, 890 F. Supp. 250 (S.D.N.Y. 1995)). Art cases, of course, also cite to other art cases that sound in the same doctrine. See, e.g., *Thome*, 70 A.D.3d at 105 (citing *Kirby v. Wildenstein*, 784 F. Supp. 1112 (S.D.N.Y. 1992)); *Simon-Whelan*, 2009 WL 1457177, at *6 (citing *Vitale v. Marlborough Gallery*, 93-CV-6276(PKL), 1994 WL 654494 (S.D.N.Y. July 5, 1994)).

23. For example, the Pollock-Krasner Authentication Board evaluates whether artwork submitted

determinations are taken seriously by the art market and can have a tremendous effect on the value of a work of art.²⁴ Part I.A briefly outlines the basic elements of an antitrust case and then explains how those elements may be applied against Boards. Part I.B then discusses in some detail the concept of antitrust standing.

A. ANTITRUST LAW IN (VERY) BRIEF²⁵

1. The Complaint and the Defense

The elements of an antitrust claim are: “(1) a violation of antitrust law; (2) injury and causation; and (3) damages.”²⁶ The two most common violations are breaches of sections 1 and 2 of the Sherman Act.²⁷ To make out a violation of section 1, a plaintiff must demonstrate collusion that restrains or threatens to restrain trade in a specific geographic and product market. Section 2 prohibits monopolization of a relevant geographic and product market.²⁸

Depending on the factual situation, courts take one of two approaches to analyzing section 1 claims. Complaints may state “per se” violations of antitrust laws, or they may state violations that need to be subjected to the “rule of reason” analysis, under which courts weigh the alleged anticompetitive activity against any procompetitive effects it may have.²⁹ A per se violation has such clearly harmful effects on competition that it “always or almost always tends to raise price or to reduce output.”³⁰ An agreement by competitors to fix prices is a prototypical per se

to it was created by Jackson Pollock, *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. at 253, while the Andy Warhol Art Authentication Board “is responsible for authenticating the works of Andy Warhol.” *Simon-Whelan*, 2009 WL 1457177, at *1.

24. Indeed, more is at stake than money. While it is obvious that a work of art authoritatively declared “fake” will sell for less than one deemed “real,” it is also true that “[t]he authenticity of a work of visual art has always been a critical issue for anyone concerned with art, not simply for the work’s monetary value, but for its intrinsic worth.” Ronald D. Spencer, *Introduction*, in *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS*, *supra* note 7, at xi.

25. This discussion is meant to equip the reader with the antitrust vocabulary employed in this Note. It is necessarily drawn in broad strokes and omits a great deal.

26. *In re Ethylene Propylene Diene Monomer Antitrust Litig.*, 256 F.R.D. 82, 87 (D. Conn. 2009) (quoting *Cordes & Co. Fin. Services, Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 104105 (2d Cir. 2007)) (internal quotation marks omitted).

27. 15 U.S.C. §§ 1, 2 (2013). The Clayton Act specifies additional antitrust violations, some of which overlap with Sherman Act violations. 15 U.S.C. §§ 12–27, 52–53. Sometimes, cases in this Note refer to Clayton Act violations. Standing analysis is the same under either act. Since complaints in the art context are more likely to allege Sherman Act violations, this Part does not discuss the Clayton Act, except to the extent that it grants a private right of action to those injured by antitrust violations. See *infra* Part I.B.1.

28. 15 U.S.C. § 2 (2013); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320–21 (1962) (geographic and product markets).

29. Some commentators see per se and rule of reason analyses as points on a spectrum and include a “quick look” inquiry between these poles. For a discussion of the approaches to examining allegedly anticompetitive conduct, see generally *California Dental Ass’n v. F.T.C.*, 526 U.S. 756 (1999).

30. Dep’t of Justice & Fed. Trade Comm., *Antitrust Guidelines for Collaborations Among Competitors* § 3.2 (April 2000).

violation.³¹

In a rule of reason case, the plaintiff needs to define the geographic and product market in which she alleges the defendants violated the antitrust laws.³² This requirement exists because courts need some context to evaluate the competition the defendants face. As the Supreme Court put it, in a frequently quoted passage, the antitrust laws protect “competition, not competitors.”³³ After defining the market, a section 1 plaintiff must then demonstrate that the defendants exercised market power in a way that harmed the plaintiff. “Market power is the power ‘to force a purchaser to do something that he would not do in a competitive market,’ ” like paying exorbitant prices or buying additional products.³⁴ The exercise of market power by an actor in concert with another actor amounts to an illegal “combination in restraint of trade,” in the words of the Sherman Act.³⁵

Courts generally analyze section 2 claims under the rule of reason.³⁶ A section 2 plaintiff must show that the defendant possessed monopoly power and wielded it harmfully. Monopoly power is somewhat more difficult to define than market power,³⁷ but certainly amounts to “something greater than market power under § 1.”³⁸ It has been defined as “the power to control prices or exclude competition.”³⁹ It can also be seen as differing only in degree from market power; under this definition, monopoly power is nothing more than substantial market power.⁴⁰ An exercise of monopoly power with anticompetitive effects violates section 2 of the Sherman Act.

Once a plaintiff has alleged a *prima facie* case sounding in antitrust, the defendant may employ all the ordinary tools at the disposal of a civil defendant, like a motion to dismiss or a motion for summary judgment. In a rule of reason case, a defendant may invoke the affirmative defense that the procompetitive

31. *Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332, 348 (1982) (“Our decisions foreclose the argument that the agreements at issue escape *per se* condemnation because they are horizontal and fix maximum prices.”).

32. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 377, 393 (1957). For a critique of the Supreme Court’s case law on market definition, see RICHARD A. POSNER, *ANTITRUST LAW* 147-157 (2d ed. 2001) [hereinafter Posner, *Antitrust Law*].

33. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

34. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 464 (1992) (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984)).

35. 15 U.S.C. § 1 (2013). Commentators disagree about whether tacit collusion violates the antitrust laws or whether the collusion must be overt. Posner, *Antitrust Law*, *supra* note 32, at 60-69.

36. Dep’t of Justice and Fed. Trade Comm., *Antitrust Enforcement Guidelines for International Operations* § 2.1 (April 1995) (“[T]raditional *per se* offenses of the law . . . typically involve . . . cartel activities”).

37. See, e.g., HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE* 150 (2005) (“‘Monopolization’ . . . is the most poorly defined antitrust offense. The statute tells us nothing about what it means to ‘monopolize,’ and the common law history is not helpful.”).

38. *Id.* at 481.

39. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 389 (1956).

40. *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 967 (10th Cir. 1990) (quoting PHILIP E. AREEDA & DONALD F. TURNER, *ANTITRUST LAW* § 801 (1978); see also HOVENKAMP, *supra* note 37, at 151 (“The offense of monopolization requires proof of a dominant firm with substantial market power and at least one qualifying ‘exclusionary’ practice.”)).

benefits of its challenged activity outweigh any anticompetitive effects.⁴¹

2. Cases Against Standards-Setting Organizations in General, and Art Authentication Boards in Particular

The antitrust cases that are most like suits against authentication boards are suits against standards-setting organizations.⁴² One major standards-setting antitrust case, which is perhaps most analogous to suits against art authenticators, is *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*⁴³ *Radiant Burners* concerned the American Gas Association (AGA), a group of ten companies, including six manufacturers of gas burners, that determined whether or not gas burners were safe to use.⁴⁴ The market to purchase gas burners was primarily made up of stove manufacturers. These manufacturers relied on the AGA's seal of approval as an assurance of safety and would not purchase a gas burner lacking the AGA's imprimatur. Radiant Burners was a non-AGA company that made gas burners, and the AGA declined to certify that Radiant's products were safe.

Alleging a violation of section 1 of the Sherman Act, Radiant sued AGA and others. The district court granted defendants' motion to dismiss, and the Seventh Circuit affirmed. Because Radiant had failed to allege a buyer-seller relationship with defendants or a joint refusal on the part of the defendants to deal with the plaintiffs, the court held Radiant had failed to allege any "boycott, conspiracy to boycott or other form of per se violation."⁴⁵ The Supreme Court reversed, holding that the complaint's allegation that AGA conspired to deny approval to Radiant, thereby unfairly restricting Radiant's ability to sell its burners, stated a claim under section 1 of the Sherman Act.⁴⁶

Radiant Burners and similar cases matter for plaintiffs in the art authentication context because they establish that failure to issue a certification can satisfy one part of an antitrust claim, if all the other elements of a violation are met.⁴⁷ However, two features distinguish *Radiant Burners* and the other standards-setting cases from cases against art authentication boards. First, arbiters of authenticity in the art market exert continual power over works of art. The AGA could not reemerge twenty years after a certified product was sold and destroy its resale

41. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 (1984) ("Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition.").

42. See, e.g., Cal. Dental Ass'n v. FTC, 526 U.S. 756, 768-69 (1999); FTC v. Super. Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 509 (1988); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Cont'l Airline, Inc. v. United Airlines, Inc., 277 F.3d 499 (4th Cir. 2002); Jessup v. Am. Kennel Club, Inc., 61 F. Supp. 2d 5 (S.D.N.Y. 1999), *aff'd per curiam*, 210 F.3d 111 (2d Cir. 2000); see also Lacy, *supra* note 17, at 205-211 (2011).

43. 364 U.S. 656.

44. 364 U.S. at 658.

45. Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 273 F.2d 196, 199 (7th Cir. 1959).

46. 364 U.S. at 659-60.

47. For similar cases, see *supra* note 42.

value.⁴⁸ Second, in all the standards-setting cases that have occurred outside of the art market, the plaintiffs were in direct competition with the defendants, making for a more obvious conflict of interest than that in cases of art authentication.⁴⁹

Despite differences from standards-setting organizations, art authenticators exert power over submarkets in art, even without owning or selling any share of products in the relevant market. Although the Boards are not necessarily producers or sellers of art, they control the supply of authentic art in the marketplace. By controlling supply, they can force participants in the market to act in ways that they would not in a competitive market: for example, market participants may buy inauthentic work for high prices or sell authentic work at low prices.⁵⁰ In a competitive market—one with low transaction and information costs and in which prices accurately reflect value—purchasers would not assume the risk of erroneous authentication decisions. Instead, the market would reliably set the price for given works of modern art, without fear that the market value would crash at any second upon an adverse determination of authenticity. Inaccurate determinations of authenticity by art boards introduce inefficiency into the market, which increases the information costs for buyers looking to buy genuine articles, as well as creating other problems.⁵¹

The basic complaint of an antitrust plaintiff against an art authentication board would be that the board, either with another entity or on its own, exercised its market power in a way that damaged the plaintiff.⁵² This damage might occur if a board falsely declared that art owned by the plaintiff was not genuine,⁵³ or even if a board had such a bad reputation that the market incorporated the risk that the board's declaration of authenticity was false, lowering prices and causing dealers to lose profits.⁵⁴ Whatever the facts alleged, a plaintiff must show antitrust standing, to which this Note now turns.

B. ANTITRUST STANDING

The first element of an antitrust claim is a violation of antitrust law. The second

48. Cf. Shnayerson, *supra* note 1, at 204 (collecting accounts of art owners whose stock was suddenly devalued by declarations of inauthenticity by the Andy Warhol Art Authentication Board).

49. See *supra* note 42 for the relevant cases.

50. Cf. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 464 (1992) ("Market power is the power 'to force a purchaser to do something that he would not do in a competitive market.'" (quoting *Jefferson Parish*, 466 U.S. at 14)).

51. Cf. Shnayerson, *supra* note 1, at 204-11.

52. See Steven Reiss, *Panel 2: The Rights and Responsibilities of Authenticating Art*, 35 Colum. J.L. & Arts 393, 400-01 (2012) (discussing how to state an antitrust claim premised on art authentication).

53. *Simon-Whelan v. Andy Warhol Found. For The Visual Arts, Inc.*, 1:07-cv-6423 (LTS) 2009 WL 1457177 (S.D.N.Y. May 26, 2009).

54. Such a claim would be unusual and difficult to prove, but at least one lawyer has argued that it accurately describes the market for modern art. See Richard A. Altman, *Panel 2: The Rights and Responsibilities of Authenticating Art*, 35 Colum. J.L. & Arts 393, 395 (2012) ("I feel that essentially you have a situation where [a board] actually has the power to drive down the price of art because it increases the uncertainty that any buyer who has to go to a foundation would have.").

element, “injury,” has been limited to “antitrust injury,” or, as the Supreme Court has put it, “injury of the type the antitrust laws were intended to prevent.”⁵⁵ On top of these elements, a plaintiff must describe the relevant market in which the violation has taken place (in a rule of reason case), and he must, in all cases, have antitrust standing. Antitrust standing is a prudential bar to recovery (unlike the distinct constitutional requirement of Article III standing that exists in every law suit) that courts have erected in interpreting the Clayton Act.⁵⁶

Part I.B.1 of this Note introduces the Clayton Act’s grant of a right of action to those injured by antitrust violations. Parts I.B.2 through 4 discuss the interpretation of that statutory grant by various courts, including the Supreme Court, the Circuit Courts of Appeals and the District Court for the Southern District of New York (in *Simon-Whelan*). Part I.C summarizes scholarly analysis of antitrust standing.

1. Statutory Background

The Clayton Act grants a private right of action, and potentially treble damages, to “[a]ny person . . . injured in his business or property by reason of anything forbidden in the antitrust laws.”⁵⁷ The Sherman Act declares that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”⁵⁸ Thus, the Clayton Act allows private citizens to sue for damages caused by violation of the Sherman Act. But courts have imposed a prudential limitation on antitrust standing, because a literal reading of these statutes would be overly broad: after all, every contract restrains trade.⁵⁹ For example, a subcontractor outbid by a competitor is “injured in his business” when the general contractor accepts a lower bid, forming a contract that restrains trade. The antitrust laws could not function if any person disadvantaged by a normal contract had standing to sue under the Clayton Act.

Instead of a literal reading of the Clayton and Sherman Acts, courts have used the antitrust statutes as a starting point to create federal common law regulating

55. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

56. Some courts consider antitrust injury to be a necessary but insufficient part of antitrust standing (*see, e.g., Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 72 (1st Cir. 2005)), while others fold the injury and standing inquiries together (*see, e.g., MacPherson’s Inc. v. Windermere Real Estate Services Co.*, 100 F. App’x 651, 654 (9th Cir. 2004)), and still others treat the two concepts as analytically distinct (*see, e.g., Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 395 (7th Cir. 1993)). Whether or not antitrust standing and injury are disaggregated matters little in terms of the outcome of antitrust cases: without either, a plaintiff cannot recover damages, and without showing a likelihood of antitrust injury, a plaintiff cannot obtain an injunction. *See* Roger D. Blair and Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 Vand. L. Rev. 1539, 1551 (1989) [hereinafter Blair & Harrison, *Rethinking*] (“Whether these two tests are viewed as components of a general test for antitrust standing or as separate tests with the first addressing antitrust injury and the second addressing antitrust standing is functionally inconsequential.”).

57. 15 U.S.C. § 15 (2013).

58. 15 U.S.C. § 1 (2013).

59. *Am. Needle, Inc. v. Nat’l Football League*, 130 S. Ct. 2201, 2208 (2010); *Bd. of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918).

collusion and monopolization.⁶⁰ For a number of reasons, including a change in the law that made the Supreme Court's review of antitrust cases discretionary,⁶¹ as well as the murkiness of the statutory text, courts have split in various ways over the interpretation of many aspects of antitrust laws, especially standing.

2. The Supreme Court

The Supreme Court has addressed antitrust standing in nine cases.⁶² For the purposes of this Note, the most important are *Hanover Shoe*, *Illinois Brick*, *UtiliCorp*, *McCready* and *Associated General Contractors* ("AGC"). Unfortunately, read separately or together, these cases fail to articulate a coherent test to determine whether a plaintiff has antitrust standing. AGC lays out a number of relevant factors that courts consider in determining whether to hold that a plaintiff has antitrust standing, while the other cases deal with the standing consequences of circumstances where, as in the art authentication context, the plaintiff has an attenuated relationship with the defendant.

None of these cases have been overturned, and they continue pull litigants, scholars and market participants in conflicting directions. Courts and commentators face difficulty in attempting to distill uncontroversial principles of antitrust standing, but certain concerns that animate antitrust standing inquiries do emerge. For example, the Court has worried about the risk that a defendant may pay multiple damage awards for the same bad conduct and, inversely, about the danger that too much restriction on access to courts might diminish the motivation for plaintiffs to police antitrust violations. In order to show how this doctrine developed, the cases are described chronologically below.

a. Brunswick and the Dawn of Antitrust Standing

Before the phrase "antitrust standing" was coined, the Supreme Court held in *Brunswick v. Pueblo Bowl-O-Mat* that the plaintiffs had failed to allege an injury of the sort that the antitrust laws were designed to prevent, and that the jury verdict in favor of the plaintiffs was therefore to be reversed.⁶³ *Brunswick* did not speak in terms of standing, but it did limit the types of recoverable injuries in antitrust suits. Antitrust injury was determined by a two-part inquiry: (1) Was "the injury of the type the antitrust laws were intended to prevent," and (2) did it flow "from that

60. Posner, *Antitrust Law*, *supra* note 32, at 33-50.

61. *Id.* at 130-31.

62. *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983); *Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982); *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979); *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

63. 429 U.S. at 489 ("We therefore hold that the plaintiffs . . . must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.").

which makes defendants' acts unlawful"?⁶⁴ Currently, most courts and commentators view antitrust injury as analytically distinct from, but related to, antitrust standing, or as a necessary but not sufficient component of antitrust standing. The importance and vitality of the antitrust injury concept varies by circuit.⁶⁵

b. Hanover Shoe, Illinois Brick and Indirect Purchaser Status

Hanover Shoe held that it is no defense to an antitrust violation that the plaintiff passed its injury onto consumers in the market.⁶⁶ The plaintiff in that case leased shoemaking equipment directly from the defendant, which had monopolized the market for shoe-production machinery.⁶⁷ The defendant argued that *Hanover Shoe* had passed any damages it suffered from the monopolization on to its customers in the form of higher prices.⁶⁸ The Supreme Court held, "[a]s long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows,"⁶⁹ rendering unavailable the "passing-on" defense.

In *Illinois Brick*, the State of Illinois and local governments sued concrete block manufacturers, alleging that they had conspired to raise prices for concrete blocks.⁷⁰ The governments were indirect purchasers, because they bought the concrete from a contractor who had purchased directly from the manufacturer. The manufacturers argued that the plaintiffs lacked antitrust standing to sue, because *Hanover Shoe* made the manufacturers liable to the contractors.⁷¹ The Supreme Court agreed, framing the issue as the same one presented in *Hanover Shoe*: "whether the overcharged direct purchaser should be deemed . . . to have suffered the full injury from the overcharge."⁷² The Court held that the direct purchaser had suffered the only full injury, and that an indirect purchaser cannot have antitrust standing against a price fixer.⁷³

The *Illinois Brick–Hanover Shoe* doctrine excludes indirect purchasers. The exclusion may have resulted from the timing of the cases at the Supreme Court: when the Court decided *Hanover Shoe*, it was unwilling to allow a defendant to escape liability by arguing that two wrongs (the antitrust violation and the passing on of higher prices) made a right. But once that case was decided, the Court could not allow every potential plaintiff in a supply chain to sue the alleged antitrust violator.⁷⁴ This chronological accident granted a windfall to direct purchasers, who

64. *Id.*

65. See *infra* Part I.B.3 for the Circuits' varying approaches to antitrust standing and how antitrust injury relates to the relevant inquiries.

66. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968).

67. *Id.* at 482.

68. *Id.*

69. *Id.* at 489.

70. *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

71. *Id.* at 722.

72. *Id.* at 726.

73. *Id.* at 734.

74. See *Ill. Brick*, 431 U.S. at 765 (Blackmun, J., dissenting) ("If *Hanover Shoe* . . . had not preceded this case, and were it not 'on the books,' I am positive that the Court today would be affirming,

may pass on injuries they suffer to customers and still recover treble damages, and it shut the courthouse doors on indirect purchasers who may lack the opportunity to pass on their injuries.⁷⁵

c. *Blue Shield v. McCready*

Decided five years after *Illinois Brick*, *Blue Shield v. McCready*⁷⁶ is the high water mark for a liberal conception of antitrust standing.⁷⁷ In *McCready*, the plaintiff subscribed to an employer-provided insurance plan. When the insurer refused to reimburse McCready for psychological treatment, she sued, alleging a violation of the antitrust laws.⁷⁸ The Supreme Court brushed aside the insurer's assertion that McCready lacked standing as an indirect purchaser, since her employer took money from her paycheck to purchase the insurance plan on her behalf. Instead, the Court held that the Clayton Act's "lack of restrictive language reflects Congress' expansive remedial purpose in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations."⁷⁹ The Court then recharacterized *Illinois Brick*: instead of erecting an absolute bar to suits by indirect purchasers, the *McCready*

perhaps unanimously, the judgment of the Court of Appeals [granting standing to the indirect purchasers.]); see also Barak D. Richman & Christopher R. Murray, *Rebuilding Illinois Brick: A Functional Approach to the Indirect Purchaser Rule*, 81 S. Cal. L. Rev. 69, 78 (2007) ("Recent scholarship on *Illinois Brick* suggests that Justice Blackmun was correct.").

75. See *Ill. Brick*, 431 U.S. at 749 (1977) (Brennan, J., dissenting) ("Today's decision flouts Congress' purpose and severely undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement. . . . [I]n many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution."). Richard Posner and William Landes dismiss the windfall point by arguing that *all* antitrust plaintiffs get a windfall: that's the point of treble damages. William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. Chi. L. Rev. 602, 634 (1976).

76. 457 U.S. 465 (1982).

77. "Liberal" here means most likely to allow a suit to proceed. Interpretations of antitrust laws often subvert our expectations about "liberal" and "conservative" approaches to legal methods: jurists like Judge Posner, Judge Easterbrook, and Justice Scalia take a purposivist approach to reading the Sherman and Clayton Acts, while liberals like Justice Brennan, the author of the Court's opinion in *McCready*, hew more closely to the statutory text in opposition to erecting barriers to court. For Posner's views, see Posner, *Antitrust Law*, *supra* note 32, at 2 (asserting that the purpose of the antitrust laws is to maximize Kaldor-Hicks efficiency). For Easterbrook's approach, see, e.g., *U.S. Gypsum Co. v. Indiana Gas Co., Inc.*, 350 F.3d 623 (7th Cir. 2003) (permitting complaint sounding in antitrust to survive motion to dismiss without analyzing text of Clayton and Sherman acts). For Scalia, see *Bus. Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 732 (1988) ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890."); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989) ("[I]t is perhaps easier for me than it is for some judges to develop general rules, because I am more inclined to adhere closely to the plain meaning of a text."). For Brennan, see *McCready*, 457 U.S. at 472 (engaging in textual analysis of Clayton Act).

78. *McCready*, 457 U.S. at 465-66.

79. *McCready*, 457 U.S. at 472.

Court held “that the feasibility and consequences of implementing particular damages theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under § 4.”⁸⁰ *McCready* announced an antitrust standing test that looked to the nexus between the antitrust violation and the harm suffered, as well as to whether the nature of the injury sustained was one that the antitrust laws were designed to forestall.⁸¹ While some have argued that *McCready*’s retreat from a strict reading of *Illinois Brick* rendered that case obsolete,⁸² the Court reaffirmed an absolute bar to suits by indirect purchasers in *Kansas v. UtiliCorp United, Inc.*,⁸³ and there does not appear to be any jurisprudential basis for considering *Illinois Brick* to be a dead letter.

In *UtiliCorp*, the indirect purchasers were the people of Kansas and Missouri. The state residents bought their gas from public utility companies, who purchased from the defendants.⁸⁴ Each state sued as *parens patriae*, arguing that the defendants, producers of natural gas, illegally inflated the price so that the people of Kansas and Missouri paid more for gas than they would have in a competitive market.⁸⁵ The states argued that, in contrast to the situation in *Illinois Brick*, the direct purchasers had passed on *all* of their injury, leaving the utilities with no motivation to sue.⁸⁶

The Court showed none of the special solicitude toward the states that animated a pair of recent Article III standing cases.⁸⁷ Kansas and Missouri, the Court decided, could not sue on behalf of their residents, because the residents were indirect purchasers who lacked antitrust standing. Allowing the case to proceed would risk duplicative recovery from the defendants, who might also be liable to the public utilities for the same violation.⁸⁸

d. Associated General Contractors

The Supreme Court’s most recent thorough treatment of antitrust standing, *Associated General Contractors, Inc. v. California State Council of Carpenters*,⁸⁹ is now the starting point for most antitrust standing analyses.⁹⁰ The case’s outcome

80. *Id.* at 475.

81. *Id.* at 478.

82. Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of Illinois Brick in Modern Antitrust Standing Analysis*, 68 GEO. WASH. L. REV. 1, 42 (1999).

83. 497 U.S. 199 (1990).

84. *Id.* at 200.

85. *Id.*

86. *Id.* at 205.

87. *See* Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2535 (2011) (affirming lower court’s holding that states face easier standing requirements than other entities); *Massachusetts v. E.P.A.*, 549 U.S. 497, 520 (2007) (“Given that procedural right and Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”).

88. *UtiliCorp*, 497 U.S. at 212-13.

89. 459 U.S. 519 (1983).

90. *See infra*, Part I.B.3.a.

was that the plaintiff lacked standing,⁹¹ but the holding is difficult to identify. The Court noted that the plaintiff, a union, was neither a consumer nor a competitor in the relevant market, but it also discussed a number of other factors unrelated to the plaintiff's status as a consumer or a competitor.⁹²

The factors that the Court considered were not formulated as a "test." Rather, the Supreme Court discussed at length certain facts in the case that were relevant to the outcome. Nowhere did the Court indicate whether one particular factor may be dispositive or how much weight to assign each factor.⁹³ The Court noted that the complaint alleged "a causal connection between an antitrust violation and harm to the Union and . . . that the defendants intended to cause that harm."⁹⁴ Although those allegations militated in favor of allowing the suit to proceed, the Court warned that "[a] number of other factors may be controlling."⁹⁵ The Court summarized these other factors as "the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy."⁹⁶ Elsewhere in the opinion, the Court noted that "the Union was neither a consumer nor a competitor in the market in which trade was restrained. It is not clear whether the Union's interests would be served or disserved by enhanced competition in the market."⁹⁷

The lower courts have adopted divergent views on how to interpret the Supreme Court's ambiguous discussion in *AGC*. *AGC* identifies antitrust policy concerns and links the determination of antitrust standing to them, but beyond that unsatisfying conclusion, it is difficult to state the implications of *AGC* with confidence.

3. Confusion in the Circuit Courts

Since none of the above Supreme Court cases have been overruled, the circuit courts are in some disarray about how to approach antitrust standing. The sections below outline the tests that the circuit courts have divined from the Supreme Court's instructions.⁹⁸

a. The Majority Approach

The First, Fourth, Fifth, Sixth, Seventh, Tenth, D.C. and Federal Circuits generally follow the same approach in determining whether a plaintiff has antitrust standing. The approach comes from the Supreme Court's discussion of factors in

91. *AGC*, 459 U.S. at 521.

92. *See id.* at 539-545.

93. *See id.*

94. *Id.* at 537.

95. *Id.* at 538.

96. *Id.* at 545.

97. *Id.*

98. *See infra* part I.C.2.a-d.

AGC that led it to deny standing to the plaintiffs; it is summarized by the First Circuit as follows:

There are six nonexclusive factors to consider in determining whether a plaintiff has antitrust standing: (1) the causal connection between the alleged antitrust violation and harm to the plaintiff; (2) an improper motive; (3) the nature of the plaintiff's alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws ("antitrust injury"); (4) the directness with which the alleged market restraint caused the asserted injury; (5) the speculative nature of the damages; and (6) the risk of duplicative recovery or complex apportionment of damages.⁹⁹

Despite the lack of clarity in the eponymous decision, this Note refers to the six nonexclusive factors as the "*AGC* test."

b. The Consumer-or-Competitor Test

Before holding that the plaintiff lacked antitrust standing, the *AGC* court acknowledged that it "was neither a consumer nor a competitor in the market in which trade was restrained."¹⁰⁰ Despite *AGC*'s discussion of other factors, some courts and commentators endorse a test that depends on the plaintiff's status as a consumer or competitor in the restrained market, an approach that had gained broader acceptance before *AGC*'s wide-ranging discussion. It is important to note that the consumer-or-competitor test refers to consumers of a restrained product or competitors in the relevant market—not consumers or competitors of the defendant.¹⁰¹ In the Eighth Circuit, a consumer or competitor will have standing, and a plaintiff that cannot be described as such will lack standing.¹⁰² In the Third

99. *Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 72 (1st Cir. 2005) (internal quotation marks omitted). The Fourth Circuit folds the first two factors together into one; see *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 311 (4th Cir. 2007). The Fifth Circuit has followed the same approach as the First Circuit, but has not always been consistent. See *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 422 (5th Cir. 2001) (applying the six nonexclusive factors); but see *Norris v. Hearst Trust*, 500 F.3d 454, 467 (5th Cir. 2007) (applying the consumer-or-competitor test). (The consumer-or-competitor test is discussed *infra* Part I.B.3.b). For the Sixth, Seventh, Tenth, D.C., and Federal Circuits, see *Caruana v. Gen. Motors Corp.*, 204 F. App'x 511, 515 (6th Cir. 2006); *Kochert v. Greater Lafayette Health Services, Inc.*, 463 F.3d 710, 718 (7th Cir. 2006); *City of Chanute, Kan. v. Williams Natural Gas Co.*, 955 F.2d 641, 652 n.14 (10th Cir. 1992); *Andrx Pharmaceuticals, Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 806 (D.C. Cir. 2001); *Indium Corp. of Am. v. Semi-Alloys, Inc.*, 781 F.2d 879, 882 (Fed. Cir. 1985).

100. *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 539 (1983).

101. See, e.g., *Ostrofe v. H.S. Crocker Co., Inc.*, 740 F.2d 739, 749 (9th Cir. 1984) (Kennedy, J., dissenting) ("Ostrofe was not a competitor or consumer in the market affected by the price-fixing conspiracy . . .").

102. *S.D. Collectibles, Inc. v. Plough, Inc.*, 952 F.2d 211, 213 (8th Cir. 1991). The Seventh Circuit formerly applied the consumer-or-competitor test. See *In re Indus. Gas Antitrust Litig.*, 681 F.2d 514, 519 (7th Cir. 1982) (granting standing only to those who, as consumers or competitors, suffered immediate injuries). However, the Seventh Circuit now applies the six-factor *AGC* test. See *Kochert*, 463 F.3d at 718; see also Keith R. Bevan, *Antitrust Law—The Need for an Express Test to Determine Antitrust Standing*: *Ostrofe v. H. S. Crocker Co.*, 11 J. CORP. L. 123 (1985) ("[T]here is an underlying doctrine in the Supreme Court's decisions that only competitors and consumers have standing to bring suit under section 4 of the Clayton Act.").

Circuit, consumer-or-competitor status is only the beginning of the antitrust standing inquiry. There, a proper plaintiff must be a consumer or competitor in the restrained market in order to show antitrust *injury*, a necessary but not sufficient component of antitrust *standing*, which is determined by the *AGC* factors.¹⁰³

The Eighth and Third Circuits are the only circuits that have applied the consumer-or-competitor test without a more recent case endorsing a different approach.¹⁰⁴ However, the test may have some vitality outside of these courts, because some circuits are inconsistent in their own antitrust standing jurisprudence, and even after *AGC* have occasionally applied the consumer-or-competitor test.¹⁰⁵

c. The Second Circuit's Efficient Enforcer Test and the Ninth's Circuit's Injury Test

In line with modern scholarship and enforcement that prizes economic efficiency as an important—or crucial—goal of antitrust law,¹⁰⁶ the Second Circuit will find that a plaintiff lacks standing unless it is an “efficient enforcer” of the antitrust laws.¹⁰⁷ Efficient enforcers are directly injured by defendants’ wrongful conduct, and allowing them to recover would not risk duplicative recovery from the defendants by other plaintiffs who may be more directly injured. The Second Circuit considers a list of factors similar to the *AGC* factors, but more finely tuned to the economic concerns of antitrust enforcement:

(1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.¹⁰⁸

The Ninth Circuit’s and the Second Circuit’s tests differ only in form. Unlike most courts, the Ninth Circuit does not consider antitrust standing to be distinct

103. *SigmaPharm, Inc. v. Mut. Pharm. Co., Inc.*, 454 F. App’x 64, 68 (3d Cir. 2011). *But see* *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1165 (3d Cir. 1993) (applying *AGC* test without inquiring as to consumer-or-competitor status).

104. *S.D. Collectibles*, 952 F.2d. at 213.

105. Maxwell M. Blecher & James Robert Noblin, *The Confluence of Muddied Waters: Antitrust Consequential Damages and the Interplay of Proximate Cause, Antitrust Injury, Standing and Disaggregation*, 13 ST. JOHN’S J. LEGAL COMMENT. 145, 163 n.72 (1998) (citing *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 596 (7th Cir. 1995); *T.O. Bell v. Dow Chem. Corp.*, 847 F.2d 1179, 1183 (5th Cir. 1988); *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 540 (9th Cir. 1987); *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 809 (8th Cir. 1987)).

106. *See infra* part I.C.1.

107. *Siti-Sites.com, Inc. v. Verizon Communications, Inc.*, 428 F. App’x 100, 102 (2d Cir. 2011) (“In addition to stating an antitrust injury, a plaintiff must show that it is an ‘efficient enforcer’ of the antitrust laws.”).

108. *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 443 (2d Cir. 2005) (internal quotations omitted). The Eleventh Circuit also grants standing to plaintiffs who are called “efficient enforcers” of the antitrust laws, but in defining who efficient enforcers are, it applies the *AGC* factors. *See Palmyra Park Hosp. Inc. v. Phoebe Putney Mem’l Hosp.*, 604 F.3d 1291, 1299 (11th Cir. 2010).

from antitrust injury.¹⁰⁹ In the Ninth Circuit, “[a]ntitrust standing requires that a plaintiff show: (1) unlawful conduct; (2) causing injury to plaintiff; (3) that flows from that which makes the conduct unlawful; (4) and is the type of injury that antitrust law guards against.”¹¹⁰ This is the antitrust injury requirement mandated by *Brunswick*.¹¹¹ In considering the Ninth Circuit’s fourth factor, a court will weigh: “(1) the nature of the plaintiff’s alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages.”¹¹²

In other words, the Ninth Circuit calls the injury requirement of *Brunswick* “antitrust standing.” Included in the Ninth Circuit’s antitrust standing test is a factor called “injury of the type the antitrust laws were intended to prevent,” which is met by the same showing that the Second Circuit requires of plaintiffs who would be efficient enforcers of the law.¹¹³ The Ninth Circuit thus engages in the same substantive inquiry as the Second Circuit but uses different terminology, folding the Second Circuit’s antitrust standing requirement into the Ninth’s antitrust injury test.

4. *Simon-Whelan’s Standing Analysis*

*Simon-Whelan v. Andy Warhol Foundation for the Arts*¹¹⁴ is the only antitrust case against an art authentication board to have survived a motion to dismiss.¹¹⁵ In it, Joe Simon-Whelan alleged that the Warhol Foundation had conspired with the Warhol Authentication Board to restrain trade in the market for Warhol’s art and that the Foundation had monopolized the same market.¹¹⁶ Simon-Whelan claimed that the conspiracy and monopolistic practices induced the Board to falsely deny the authenticity of his artwork, thus devaluing it.¹¹⁷

On the Foundation’s motion to dismiss, the court held that the plaintiff had standing on his monopolization claim because he was a would-be competitor in the market for authentic art by Andy Warhol.¹¹⁸ But the court held that Simon-Whelan lacked standing on his conspiracy price-inflation claim because he was not a

109. The Ninth Circuit’s standing inquiry is a case in point for Blair & Harrison, *Rethinking*, *supra* note 56, at 1551, who conclude that whether or not a court treats standing and injury separately is “functionally inconsequential.” For a brief discussion of some opinions on the relationship between the two concepts, see *supra* note 56.

110. *MacPherson’s Inc. v. Windermere Real Estate Serv. Co.*, 100 F. App’x 651, 654 (9th Cir. 2004).

111. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). See discussion *supra*, part I.B.2.a.

112. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 987 (9th Cir. 2000).

113. *Id.*

114. 1:07-cv-6423(LTS), 2009 WL 1457177 (S.D.N.Y. May 26, 2009).

115. Lacy, *supra* note 17, at 191.

116. These are violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (2013).

117. *Id.*

118. *Simon-Whelan*, 2009 WL 1457177, at *6.

consumer of art sold by the Andy Warhol Foundation for the Visual Arts.¹¹⁹ The court did not consider any other possible grounds for antitrust standing.

There are a number of plausible ways to characterize the court's standing analysis. Because the court only looked at the plaintiff's status as a consumer or competitor, I view the *Simon-Whelan* analysis as an application of the consumer-or-competitor test. That test, however, should look not to whether the plaintiff is a consumer who purchased from the defendant, but whether the plaintiff is a consumer in the relevant market.¹²⁰ Therefore, the *Simon-Whelan* analysis appears to be a *misapplication* of the consumer-or-competitor test. Had the court looked to whether Simon-Whelan was a consumer in the market for Warhol's art, the answer clearly would have been yes, since he bought and sold artwork by Andy Warhol.

Another plausible reading of the court's analysis is that it imported the standing inquiry from the essential facilities doctrine. An essential facilities antitrust claim arises when a defendant exclusively provides some good or service that the plaintiff requires, and the plaintiff claims the defendant abuses this position of exclusivity. In this type of case, a plaintiff has standing if he is a competitor in the relevant market or a consumer who purchases from the defendant.¹²¹ Yet the court discusses Simon-Whelan's status as a consumer or competitor but does not discuss essential facilities,¹²² and it does not purport to add anything to antitrust standing doctrine; the case is thus most naturally read as a misapplication of the consumer-or-competitor test.

A third way to view the *Simon-Whelan* analysis is that it creates a new antitrust standing test, perhaps one especially relevant to art authentication cases. But again, the court does not purport to create new law, but only to apply existing law. The case, therefore, is still most easily read as a misapplication of the consumer-or-competitor test.

It is worth drawing attention to *Simon-Whelan*'s approach for a number of reasons. Art cases, under whatever kind of legal theory they arise, can affect all areas of law that involve the market for art. There is relatively little litigation in the art market, and many commentators assert that there are exceptional circumstances relevant to art—notably the expertise required to judge authenticity—that single out art cases for special treatment. These factors combine to create a body of “art law” that has developed alongside of developments in fields like antitrust or fraud, and there is a manageable and self-referential corpus of cases that deal with art.¹²³

119. *Id.*

120. *Ostrofe v. H.S. Crocker Co., Inc.*, 740 F.2d 739, 749 (9th Cir. 1984) (Kennedy, J., dissenting) (“Ostrofe was not a competitor or consumer in the market affected by the price-fixing conspiracy . . .”).

121. *See Kramer v. Pollock-Krasner Foundation* 890 F. Supp. 250, 254 (S.D.N.Y. 1995). Defendants in *Simon-Whelan* argued that it was an essential facilities case, but the court did not use terminology from that doctrine.

122. *Simon-Whelan*, 2009 WL 1457177, at *6.

123. For a discussion of the limited litigation in the art field, see Kai B. Singer, Note, “*Sotheby's Sold Me a Fake!*”—*Holding Auction Houses Accountable for Authenticating and Attributing Works of Fine Art*, 23 COLUM.-VLA J.L. & ARTS 439, 443 (2000) (“A survey of the case law in this field is unsatisfactory for two reasons. On the one hand the embarrassment of having been duped coupled with the exorbitant expenses involved in litigation has persuaded many disappointed buyers to settle their

Also, the *Simon-Whelan* case itself has settled and will not be appealed, so the Second Circuit will not have the opportunity to examine the case.¹²⁴ Lastly, the Warhol Board, previously the most visible art-antitrust defendant, has dissolved, limiting the opportunities for similar litigation.¹²⁵ Because *Simon-Whelan* cannot be reversed and is likely to be relied on in other art cases, whether sounding in antitrust or not, its errors should be brought to light.

C. SCHOLARSHIP ON ANTITRUST STANDING

Scholars agree that the state of the law on antitrust standing is incoherent.¹²⁶ Those who advocate for changes to the law tend to fall into two camps: proponents

claims out of court.”). For the contention that art should be treated differently from other subject matters of litigation, see generally Samuel Butt, *Authenticity Disputes in the Art World: Why Courts Should Plead Incompetence*, 28 COLUM. J.L. & ARTS 71 (2004) (discussing how the technical rules of courts are often at odds with the realities and necessities of the art world).

124. *Plaintiffs Drop All Charges Against the Andy Warhol Foundation; Settlement Reached*, BOIES, SCHILLER & FLEXNER LLP (Mar. 29, 2011), http://www.bsflp.com/news/in_the_news/000120.

125. Robin Pogrebin, *Foundation Aims to Sell or Donate All Its Warhols*, N.Y. TIMES, Sept. 6, 2012, at C1, available at <http://www.nytimes.com/2012/09/06/arts/design/warhol-foundation-to-disperse-collection.html> (“This year the foundation got out of the authentication business . . . partly because legal disputes were a financial drain.”). For background on the decision to dissolve, see Stephanie Cash, *Warhol Board Quits the Authentication Game*, ART IN AMERICA, Oct. 20, 2011, available at <http://www.artinamericamagazine.com/news-opinion/news/2011-10-20/warhol-board-quits-the-authentication-game>. Journalists were quick to seize on the ongoing criticism of the Authentication Board that its decisions were arbitrary at best, and declared that the Board dissolved because of lawsuits, particularly *Simon-Whelan*. See Alison Nastasi, *The Andy Warhol Authentication Board Shuts Down Due to Legal Crisis*, FLAVORWIRE (Oct. 20, 2011, 7:30 PM), <http://flavorwire.com/222697/the-andy-warhol-authentication-board-shuts-down-due-to-legal-crisis>; Julia Halperin, *Warhol Authentication Board to Dissolve Due to Millions of Dollars in Legal Fees*, ARTINFO (Oct. 25, 2011), <http://www.blouinartinfo.com/contemporary-arts/article/38912-warhol-authentication-board-to-dissolve-due-to-millions-of-dollars-in-legal-fees>. The Warhol Foundation averred that it was dissolving the Board to allow the Foundation to devote more attention to charitable projects. See *Statement from the Board of Directors*, THE ANDY WARHOL FOUNDATION, http://www.warholfoundation.org/legacy/authentication_procedure.html (last visited Nov. 8, 2013).

126. LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* § 17.2 (2d ed. 2006); Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with Brunswick v. Pueblo Bowl-O-Mat*, 66 ANTITRUST L.J. 273, 288 (1998) (“Despite the improvements to antitrust analysis that have resulted from the antitrust injury doctrine, one recurring problem that has developed in the cases decided after *Brunswick* is the courts’ confusion as to the meaning of ‘standing’ and the role of ‘antitrust injury’ in ‘standing’ analysis.”); Bevan, *supra* note 102, at 123-24 (“[T]he Supreme Court has not been effective in its attempt to clarify antitrust standing . . .”). One scholar purports to know what antitrust standing and antitrust injury are, but acknowledges that “[t]he courts experience difficulties of several distinct kinds in applying the doctrine.” Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 ANTITRUST L.J. 697, 700 (2003). In an odd twist, Davis states that he can determine “the true meaning of antitrust injury by examining how courts have frequently mistaken something else for antitrust injury.” *Id.* Since “antitrust injury” is purely judge-created, it doesn’t make sense that the judges in the common-law process of creating the concept can do it wrong in such a way that a non-judge can elucidate what the judges are trying to create. Davis’s article tries to hide the opinions underlying its conclusions by asserting that antitrust injury exists in some objective way and that courts with whom he disagrees are erroneous, but it may be better to view those courts as occupying a normative position distinct from that of Davis.

of applying the “Chicago School” of economic analysis of law to antitrust and proponents of broader access to courts. A brief summary of these two scholarly positions follows.

1. The Chicago School

In the 1970’s, scholars connected to the University of Chicago and their allies argued that the goal of the antitrust laws ought to be maximizing economic efficiency.¹²⁷ They disagreed on the proper measure of efficiency, but did succeed in shifting the federal government’s enforcement policies, from breaking up large companies simply because they were large, to maximizing efficiency by promoting a competitive marketplace.¹²⁸

The rival measures of efficiency are Kaldor-Hicks, or potential Pareto efficiency, on the one hand, and consumer surplus on the other.¹²⁹ The Kaldor-Hicks tradeoff is a way of measuring an event’s net effect on social welfare: if consumers lose a little due to an aggregation of market power by producers, but producers gain a lot, then the market power yields “a net increase in total welfare under the Kaldor-Hicks standard.”¹³⁰ Such an aggregation of market power would fail if the goal of the antitrust laws were to maximize consumer surplus, in the sense of generating the greatest wealth for individuals at the end of the supply chain (usually by lowering prices).¹³¹

127. See Robert H. Bork, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF*, 91 (1978); Posner, *Antitrust Law*, *supra* note 32.

128. See Dep’t of Justice and Fed. Trade Comm., Horizontal Merger Guidelines § 10 (Aug. 19, 2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>. “Enforcement policy” here refers to the guidelines that the Antitrust Division of DOJ publishes (discussed in Posner, *Antitrust Law*, *supra* note 32, at 131-32). Certainly, the Antitrust Division has come under fire for its enforcement practices, which certain commentators view as closely related to political axes that the parties controlling the government have to grind. Those criticisms fault the Department for not following its policies rather than for setting policies different from its own guidelines. See, e.g., Jay L. Himes, *When Caught With Your Hand in the Cookie Jar . . . Argue Standing*, 41 RUTGERS L.J. 187, 194 (2009).

129. For the view that Kaldor-Hicks or potential Pareto efficiency should (and does) prevail, see Posner, *Antitrust Law*, *supra* note 32, at 2. For the view that maximizing consumer surplus would vindicate Congress’s intent in passing the antitrust laws, see Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 76 (1982) (“This Article argues that Congress decided that consumers were entitled to the benefits of a competitive economic system. Consumers were deemed entitled to the ‘consumers’ surplus’ because Congress regarded the competitive scenario as the normal one.”); see also Alan Devlin & Bruno Peixoto, *Reformulating Antitrust Rules to Safeguard Societal Wealth*, 13 STAN. J.L. BUS. & FIN. 225, 227 n.9 (2008) (“Potential Pareto improvement is synonymous with Kaldor Hicks efficiency.” (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 12 (Aspen 6th ed. 2003))).

130. Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 867 (2000).

131. Generally, consumer surplus is synonymous with “consumer welfare.” However, Judge Bork, employing idiosyncratic terminology, used the phrase “consumer welfare” to mean aggregate social welfare. See Bork, *supra* note 127, at 372-74. Professor Salop noted that consumer welfare and aggregate social welfare “come closer together in merger analysis if they are interpreted as long-term welfare standards and it is assumed that merger-specific cost-savings and other innovations will be rapidly imitated or emulated by other firms, increasing the rate of pass-on to consumers.” Steven C.

It is accepted among many—notably Judge Posner, a major proponent of the Chicago School—that scholars who favor using Kaldor-Hicks efficiency to guide antitrust policy have “won” the battle, at least as far as antitrust scholarship and federal enforcement policy are concerned.¹³² However, Posner’s account may be more normative than positive: other scholars maintain that the Supreme Court views the goal of antitrust policy as maximizing consumer surplus.¹³³ Additionally, economists who subscribe to the view that Kaldor-Hicks efficiency is a desirable goal for antitrust enforcement may still disagree over what policy outcomes their approach dictates in given circumstances.¹³⁴

In deciding what the optimal rule for standing would be, economists argue that the focus must be on deterring anticompetitive behavior without overcompensating plaintiffs (and thereby imposing costs on society that are no better than the costs from collusion or monopoly). The rule emerges that an “efficient enforcer” is a plaintiff who has low information costs in investigating alleged antitrust violations, who is genuinely injured by defendants’ anticompetitive conduct, whose damages are easy for courts to calculate and who will not recover damages that another plaintiff also will recover.¹³⁵

2. Calls for Broader Access to Courts

Despite Posner’s bullish account of the primacy of his own point of view, some scholars lament the gradual limitations on standing that it seems to have inspired.¹³⁶ Those who favor greater access to court would weaken the antitrust standing inquiry, making it easier for injured parties to enforce the law and thereby increasing the deterrent effect on potential violators. These scholars, not unlike Justice Brennan dissenting in *Illinois Brick*,¹³⁷ tend to focus on the breadth of the

Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669, 687 n.45 (2005).

132. See, e.g., Posner, *Antitrust Law*, *supra* note 32, at vii (noting that the author dropped the subtitle “An Economic Perspective” because at this point, there is virtually no other viable perspective); HOVENKAMP, *supra* note 37, at 15 (2005) (“The neoclassical model of economic welfare provides antitrust with many of its general principles.”).

133. Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 329 (2006) (citing *NCAA v. Bd. of Regents*, 468 U.S. at 103-04, for the proposition that the Sherman Act “focuses on the net impact on consumer welfare, that is, market price and output” and citing sources for controversy over what standard *should* guide antitrust policy).

134. Compare Landes & Posner, *supra* note 75, at 604 (“[Economic] analysis leads us to conclude that allowing indirect purchasers to sue would probably retard rather than advance antitrust enforcement.”), with HOVENKAMP, *supra* note 37, at 74-76 (arguing that injuries sustained by direct and indirect purchasers are different in kind, and therefore there is no economic justification for the *Illinois Brick* rule).

135. Landes & Posner, *supra* note 75.

136. See, e.g., C. Douglas Floyd, *Antitrust Injuries Without Antitrust Remedies*, 82 MINN. L. REV. 1 (1997); Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITT. L. REV. 437 (2001); Blair & Harrison, *Rethinking*, *supra* note 56; Richman & Murray, *supra* note 74, at 91 (2007) (“[P]recluding recourse to indirect purchasers means that justice is not delivered to every man . . .” (internal quotation omitted)).

137. See *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

antitrust laws and on congressional intent in passing the statutes, which seems to have included a desire to compensate injured plaintiffs.¹³⁸ The strongest substantive criticism of the Chicago School is that its presumptions do not adequately take into account the way that people actually behave. Even if we concede that maximizing the aggregate social welfare is a proper goal of antitrust laws, the critique goes, courts seeking to do so via standing have merely tightened the bolts on the courthouse doors by trading sound analysis for an unlikely “parade[s] of horrors.”¹³⁹

II. THE MARKET FOR MODERN ART: A SKETCH

Before evaluating the standing tests discussed above, this Note will now give an overview of the market for modern art and its relationship with the judiciary. Drawing on the principles from Part I and Part II, Part III will then examine antitrust standing analysis in the art authentication context.

There is no comprehensive regulation of the art market comparable to that of, for example, the securities market.¹⁴⁰ Sales of art are generally governed by the Uniform Commercial Code and state common law.¹⁴¹ A great deal of money rides on whether the art market has confidence that a work of art is “authentic,” and some guarantees of authenticity are more highly valued than others.¹⁴² For example, a Brillo Box by Andy Warhol recently sold at auction for \$37,663.¹⁴³ According to Christie’s, the consignor acquired this box from Warhol himself; Christie’s warranted its authenticity.¹⁴⁴ By contrast, another box sold by Christie’s of the same dimensions, appearance, material and date of execution, authenticated by the Warhol Authentication Board, sold for more than twice the amount of the box that had not been authenticated by the Board.¹⁴⁵

In addition to the averments of independent experts, auction houses and art authentication boards, the art market relies on catalogues raisonnés for authoritative

138. See 51 CONG. REC. 9073 (1914) (remarks of Rep. Webb).

139. Bauer, *supra* note 136, at 443 (“I believe that the doctrines that have been formulated are unduly restrictive and therefore yield sub-optimal enforcement.”).

140. See, e.g., Reginald Bullock, Jr., *Imposing the Underwriters’ Duty of Care on Art Auctioneers*, 7 CARDOZO ARTS & ENT. L.J. 359, 360-61 (1989) (proposing treating artworks as securities at sale); Brian D. Tobin, *The Virtues of Common Law Theories and Disclosure Requirements in the Market for Fine Art*, 21 SETON HALL J. SPORTS & ENT. L. 333, 350 (2011) (refuting Bullock’s article).

141. See generally RALPH E. LERNER & JUDITH BRESLER, ART LAW (2012).

142. For background on how forgery plagues the modern art market, why it matters, and how the law is developing in response to authenticity problems, see generally Patty Gerstenblith, *Keynote 1: Getting Real: Cultural, Aesthetic and Legal Perspectives on the Meaning of Authenticity of Art Works*, 35 COLUM. J.L. & ARTS 321, 326 (2012).

143. Andy Warhol (1928-1987) | Brillo Box, CHRISTIE’S, http://www.christies.com/lotfinder/andy-warhol-brillo-box/1983983/lot/lot_details.aspx?from=searchresults&pos=5&intObjectID=1983983&sid=5409bf3f-8e33-4b5b-8f2d-f0f7abec530e&page=2 (last visited Nov. 24, 2013).

144. See Singer, *supra* note 123, at 442-43 (outlining the warranties provided Southeby’s and Christie’s when selling modern art).

145. Andy Warhol (1928-1987) | Brillo Box, CHRISTIE’S, http://www.christies.com/lotfinder/andy-warhol-brillo-box/4002288/lot/lot_details.aspx?from=searchresults&pos=2&intObjectID=4002288&sid=5409bf3f-8e33-4b5b-8f2d-f0f7abec530e&page=2 (last accessed Nov. 24, 2013).

determinations of authenticity.¹⁴⁶ Catalogues raisonnés are intended to be comprehensive lists of an artist's body of work.¹⁴⁷ The sections below outline the role of arbiters of authenticity in the art market and then discuss some of the legal and market-based challenges facing plaintiffs who would bring suits against authentication boards.

A. THE ROLE OF ART AUTHENTICATION BOARDS

Sometimes, a Board's membership can lead observers to suspect a conflict of interest: owners of art by the artist whose oeuvre they are responsible for defining often sit on art authentication boards.¹⁴⁸

The procedures by which authentication boards reach decisions about whether a given artist authored a particular work are sometimes opaque. As the Warhol Board put it, "The panel adamantly refuses to disclose the reasons works are denied authentication."¹⁴⁹ Boards may respond to submissions from owners or dealers in art and issue opinions about the authorship of the work, or they may work with art foundations in producing a catalogue raisonné.¹⁵⁰ Wrongful determinations of authenticity carry significant costs and may constitute an antitrust violation if they result from a combination in restraint of trade or unlawful monopolization.

B. UNIQUE OR UNUSUAL FEATURES OF BOARDS' MARKET ROLE

1. Authentication Boards Do Not Sell Art

In *Simon-Whelan*, the plaintiff alleged that the Andy Warhol Foundation for the Visual Arts, which sells art that it received from the Warhol Estate, dominated the Warhol Authentication Board.¹⁵¹ Unlike the situation alleged by Simon-Whelan, authentication boards typically do not sell art—and the Warhol Board did not purport to sell art.¹⁵² Boards can exert significant market power, or even monopoly

146. See, e.g., Peter Kraus, *The Role of the Catalogue Raisonné in the Art Market*, in SPENCER, *supra* note 24, at 71 ("[A]ccurate and unimpeachable catalogues raisonnés are the bedrock on which the confidence of the marketplace is based.).

147. Michael Findlay, *The Catalogue Raisonné*, in SPENCER, *supra* note 24, at 55.

148. See, e.g., Grant, *supra* note 9, at 416 (discussing makeup of Diebenkorn board). Apparent conflicts of interest are not limited to the authentication board context. See, e.g., *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 94 (2009), *leave to appeal denied*, 933 N.E.2d 216 (2010) ("Defendant Alexander S.C. Rower is the Foundation's chairman and director, and the remaining individual defendants are trustees of the Foundation. All the individual defendants are related to Alexander Calder by blood or marriage.").

149. Levy and Scott-Clark, *supra* note 10.

150. LERNER & BRESLER, *supra* note 141, ch. 7 ("Often, the *catalogue raisonné* is prepared in conjunction with a foundation or other entity established by the artist's heirs to maintain the integrity of the deceased artist's work and to serve as a board of review to authenticate works of art from time to time.").

151. Amended Class Action Complaint, *supra* note 4, at ¶¶ 37, 60, 66, 137.

152. See, e.g., *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 253 (S.D.N.Y. 1995) (summarizing complaint that authentication board colluded with foundation to boost value of foundation's collection, without directly benefiting board). In many cases, members of authentication

power, over certain product markets, typically submarkets for the art of one artist.¹⁵³ Unlike market participants in other sectors of the economy, authentication boards do not sell or produce any product—yet they control the supply of a product (authenticated modern art) in the market.

The market power of authentication boards artificially alters the price of artwork: authenticated artwork can be much more expensive than similar unauthenticated artwork.¹⁵⁴ In extreme cases, market power may amount to monopoly power, specifically the power to control prices. An authentication board may not be able to set prices with precision, but by branding a work as not genuine, they can drive its price down to near nothing.¹⁵⁵ And a denial of authenticity to one work could conceivably increase the price of other authenticated works, in a manner similar to more familiar output restrictions.

Another feature of corporate arbiters of art authenticity is that they are typically organized as non-profit entities.¹⁵⁶ While this fact ought to have no consequence as a matter of legal doctrine,¹⁵⁷ as a practical matter, “the fact that [non-profit] firms do not distribute profits for private gain has persuaded some judges and scholars that non-profit firms may not be as interested in exploiting market power as for-profit firms are assumed to be.”¹⁵⁸ Even if non-profit status could make it more difficult in certain circumstances for a plaintiff to prevail on the merits of an antitrust claim, there is no legal reason for the defendant’s non-profit status to affect the plaintiff’s antitrust standing.

2. Authenticity May Be Determined at Any Time

Art authenticators exert continual power over artwork, meaning that owners of

boards may themselves be market participants, which would be enough to support potential antitrust violations. *See, e.g.,* *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961).

153. Such was the allegation in *Simon-Whelan* that the court found plausible. *Simon-Whelan v. Andy Warhol Found. for the Visual Arts*, 07 CIV. 6423(LTS), 2009 WL 1457177, at *6 (S.D.N.Y. May 26, 2009) (“Plaintiff has . . . sufficiently identified a relevant geographic and product market in which trade was allegedly unreasonably restrained or monopolized, as required to state a claim under Sections One and Two of the Sherman Act.”).

154. *See supra* note 142 and accompanying text.

155. *See, e.g.,* Shnayerson, *supra* note 1, at 2 (“As a salable work, Karp [an art expert] figures, the small panel [by Warhol] would be worth about \$90,000. Now it’s just a decorative wall hanging.”); *see also id.* at 1 (“[T]he board’s opinion is, like a king’s, the only one that counts, and so over this huge domain of the global art market the board’s power is absolute.”).

156. *See, e.g.,* *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 94 (N.Y. App. 2009), *leave to appeal denied*, 933 N.E.2d 216 (N.Y. 2010) (“The Calder Foundation is a private foundation formed in 1988 under New York’s Not-for-Profit Corporation Law.”); *Simon-Whelan*, 2009 WL 1457177, at *1 (“The Board is a not-for profit New York corporation . . .”).

157. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984) at n.22 (“There is no doubt that the sweeping language of § 1 applies to nonprofit entities . . .”); *United States v. Brown Univ. in Providence in State of R.I.*, 5 F.3d 658, 665 (3d Cir. 1993) (“Congress . . . intended this statute to embrace the widest array of conduct possible. Section one’s scope thus reaches the activities of nonprofit organizations . . .”).

158. Thomas J. Philipson and Richard A. Posner, *Antitrust in the Not-For-Profit Sector*, Nat’l Bur. Econ. Res. Working Paper 12132 at 3 (2006). Philipson and Posner argue that there ought to be no different treatment of non-profit from for-profit firms as a matter of antitrust policy. *Id.* at 27.

art may be subjected to adverse determinations of authenticity long after the statute of limitations has run for causes against the seller. The antitrust significance of this aspect of the market is that authentication arbiters exert even more market power than other organizations, like certification organizations, that have been determined to be subject to the Sherman and Clayton Acts.¹⁵⁹ The challenge that plaintiffs face with respect to authentication arbiters' role in the market for art is that the arbiters' ongoing power over the art market stems from the reliance of the market on their opinions.

In this regard, the arbiters have two analogues: securities rating agencies, and experts whose opinions are challenged under the Lanham Act for product disparagement.¹⁶⁰ Plaintiffs in both of these situations face significant bars to antitrust claims. In the case of securities ratings agencies, it has been noted that "the First Amendment does not allow antitrust claims to be predicated solely on protected speech."¹⁶¹ Antitrust claims based on product disparagement face additional hurdles. At least one court has suggested a categorical bar to such suits.¹⁶² Even if other courts are not willing to ban the cases altogether, a leading treatise by Philip Areeda and Donald Turner, relied on by the Ninth Circuit,¹⁶³ has advocated for a very narrow view of antitrust claims predicated on an asserted violation of the Lanham Act. Under this approach a plaintiff must show

by cumulative proof that the representations were (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals.¹⁶⁴

Two considerations counsel against assuming that the product disparagement antitrust case law will prohibit antitrust cases against art authentication boards. First, boards do in fact control the supply (if not, *sensu stricto*, output) of the relevant product: here, art that the market considers genuine. Art that has been authenticated by the relevant board is different in kind from art that has been denied authenticity. For the reason that cubic zirconium and diamonds do not occupy the same niche in the jewelry market, an authenticated silk-screened portrait by Andy Warhol is not in the same product market as a silk-screened portrait determined to

159. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 658 (1961).

160. Indeed, one commentator has suggested that product disparagement is the appropriate cause of action to assert in the case of wrongful denials of authenticity of artwork. *See generally* Jeffrey Orenstein, Comment, *Show Me the Monet: The Suitability of Product Disparagement to Art Experts*, 13 *GEO. MASON L. REV.* 905 (2005).

161. *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 860 (10th Cir. 1999). Antitrust claims may, however, be predicated on anticompetitive conduct executed by means of otherwise protected speech. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978).

162. *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 624 (7th Cir. 2005) ("Commercial speech is not actionable under the antitrust laws.").

163. *Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Pub'ns*, 108 F.3d 1147, 1153 (9th Cir. 1997).

164. *AREEDA & TURNER*, *supra* note 40, at 279.

be, as the Warhol Board would put it, “not the work of Andy Warhol.”¹⁶⁵ The former can sell for \$2,000,000, while the latter is comparatively worthless and “removed from the market.”¹⁶⁶

Secondly, the case law of the Second Circuit, where most art cases arise, is more sympathetic to product disparagement antitrust plaintiffs than is the Ninth Circuit. In *National Association of Pharmaceutical Manufacturers, Inc. v. Ayerst Laboratories*, the plaintiffs were sellers of a generic drug that competed with the defendants’ brand-name product.¹⁶⁷ The defendants sent a letter to pharmacists from a doctor, suggesting that dispensing the generic drug for indications that the FDA had only authorized the brand-name drug could expose the pharmacists to legal liability.¹⁶⁸ The plaintiffs alleged, among other causes, violation of section 2 of the Sherman Act.¹⁶⁹ The Second Circuit outlined the Areeda and Turner factors,¹⁷⁰ but only treated them as considerations before deciding not to dismiss the complaint.¹⁷¹ In other words, the Ninth Circuit treats the Areeda and Turner factors as a six-prong test, each prong of which is a necessary condition, while the Second Circuit reads the factors as considerations, more or less independent from each other, relevant to determining whether a plaintiff has stated a claim.¹⁷²

Irrespective of the challenges involved with product disparagement-based antitrust claims, the fact that authentication boards have ongoing power over the value of artwork makes antitrust laws particularly useful in attacking an abuse of the boards’ position. Owners of artwork bear the whole risk that a work of art may be deemed inauthentic after the four-year statute of limitations for breach of implied warranty has run (or after the expiration of the more generous five-year express warranty that certain sellers include).¹⁷³ The fact that authentication boards are dissimilar in some ways from traditional antitrust defendants—like manufacturers or competitors—does not mean they should be excused from curtailing competition in the market for art when they make wrongful determinations of authenticity.

165. Shnayerson, *supra* note 1, at 1.

166. Amended Class Action Complaint, *supra* note 4, at ¶¶ 148, 184, *Simon-Whelan v. Andy Warhol Found. for the Visual Arts*, 07 CIV. 6423(LTS), 2009 WL 1457177 (S.D.N.Y. May 26, 2009). Indeed, the product market that the Southern District found adequate in *Simon-Whelan* was that for “authentic” works by Warhol. 2009 WL 1457177, at *6.

167. 850 F.2d 904, 906 (2d Cir. 1988).

168. *Id.* at 907-908.

169. *Id.* at 906.

170. See *supra* text accompanying note 108.

171. *Pharmaceutical Mfrs.*, 850 F.2d at 916.

172. See also *TYR Sport, Inc. v. Warnaco Swimwear, Inc.*, 709 F. Supp. 2d 821, 838 (C.D. Cal. 2010) (“[U]nlike the Ninth Circuit, which requires a plaintiff to satisfy all of the six *Harcourt Brace* elements, the Second Circuit apparently does not find each element mandatory.”) (citation omitted). The *Harcourt Brace* elements are the Areeda and Turner factors. See *id.*

173. See *Rosen v. Spanierman* 894 F.2d 28 (2d Cir. 1990), and William W. Stuart, *Authenticity of Authorship and the Auction Market*, 54 ME. L. REV. 71, 93 (2002).

C. SHOULD COURTS AVOID INVOLVEMENT?

A prominent argument in discussions about liability for participants in the art market—and one not limited to the antitrust context—is that courts should avoid involvement altogether because they are ill-suited to making authenticity determinations. Art authentication is a subjective practice and courts will try to avoid declaring whether a given work of art ought to meet the market’s standards for authenticity.¹⁷⁴ As Justice Holmes put it, “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”¹⁷⁵

One scholar, Samuel Butt, has argued that “courts should not adjudicate disputes that concern authenticity in cases where the court becomes the determinant of the authenticity of a work by application of the relevant laws and legal standards.”¹⁷⁶ Butt contends that “the question of authenticity is too important to be left to the mechanical application of the burden of proof, which, in the art context, gives a significant advantage to the defendant.”¹⁷⁷ He also concludes that, since “a finding that the plaintiffs failed to meet their burden of proof implicitly vindicates the defendant,”¹⁷⁸ courts should decline to hear authentication disputes in the first place.

Moreover, certain market participants stress that the art market will not accept determinations of authenticity by courts.¹⁷⁹ There is no reason to doubt this conclusion, and the phenomenon of the market rejecting a court’s determination has been documented at least twice.¹⁸⁰ The argument goes that the market’s distrust of courts’ authenticity determinations (in this country, at least) renders the courts inappropriate fora for evaluating authenticity.¹⁸¹

In addition to scholarly concerns, several cases dealing with the authenticity of

174. Orenstein, *supra* note 160, at 908-09.

175. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

176. Butt, *supra* note 123, at 72.

177. *Id.* at 81.

178. *Id.* at 82.

179. See, e.g., Francis V. O’Connor, *Authenticating the Attribution of Art: Connoisseurship and the Law in the Judging of Forgeries, Copies, and False Attributions*, in SPENCER, *supra* note 24, at 23 (decrying “the cockeyed connoisseurship imposed by the courts in a crunch.”); see also SPENCER, *supra* note 24, at 189 (noting the art market’s rejection of court’s finding that Calder mobile was genuine in favor of expert opinion determined not credible by court).

180. See Butt, *supra* note 123, at 81 (“A similar result likely occurred in *Herstand*, where the disavowal of the work by the artist outweighed the decision of the court that a triable issue of fact existed as to authenticity.”); Steven Mark Levy, *Authentication and Appraisal of Artwork*, in ART LAW HANDBOOK 858 (Roy Kaufman ed., 2000) (discussing same Calder authentication as SPENCER, *supra* note 24).

181. According to Van Kirk Reeves, *Establishing Authenticity in French Law*, in SPENCER, *supra* note 24, at 227, French courts may determine authenticity as a matter of law; see also *Thome v. Alexander and Louisa Calder Foundation*, 70 A.D.3d 88, 101 (N.Y. App. 2009) (accepting this conclusion as true, noting that the New York courts had no such power, and arguing that the court’s handicap in this regard precluded the plaintiff from prevailing).

artworks, which rely on one another regardless of the substantive law at issue,¹⁸² suggest that courts will not lightly make pronouncements on the authenticity vel non of art. Two frequently cited cases are discussed below: *Thome v. Alexander & Louisa Calder Foundation*,¹⁸³ and *Hahn v. Duveen*.¹⁸⁴

In *Thome*, the plaintiff owned a stage set allegedly created by the artist Alexander Calder.¹⁸⁵ Although the plaintiff produced uncontested letters from the artist declaring that everything was “OK” with the set,¹⁸⁶ for unknown reasons, the Foundation—comprised of Calder’s relatives who owned and dealt in Calder’s art—refused to authenticate the set.¹⁸⁷ The plaintiff sued in fraud, asking the court for a declaratory judgment that the work was genuine and seeking an injunction forcing the defendants to include the work in the Calder catalogue raisonné.¹⁸⁸ The court declined such extraordinary relief, declaring, “If buyers will not buy works without the Foundation’s listing them in its catalogue raisonné, then the problem lies in the art world’s voluntary surrender of that ultimate authority to a single entity.”¹⁸⁹

Hahn established that, partially due to First Amendment concerns, experts could not be held liable for good faith expressions of opinions.¹⁹⁰ Today, practitioners continue to aver that the First Amendment presents a challenging hurdle to plaintiffs in all kinds of suits based on authentication determinations, including those sounding in antitrust.¹⁹¹ Moreover, even courts that are not asked to issue injunctions directing market participants’ behavior are hesitant to declare the authorship of a given work of art.¹⁹² In assessing the judgment of experts, courts

182. See *supra* note 22.

183. 70 A.D.3d 88 (N.Y. App. 2009).

184. 234 N.Y.S. 185 (Sup. Ct. 1929).

185. 70 A.D.3d at 94-95. As the court did, the Note will treat the allegations by *Thome* as true. *Id.* at 94.

186. *Id.* at 94-95.

187. *Id.* at 110.

188. *Id.* at 96. The statute of limitations had run on a number of more plausible legal theories like breach of contract, antitrust, and product disparagement that, if successful, would have entitled the plaintiff to damages. *Id.* at 104-11.

189. *Id.* at 103. In a rather curious moment of dicta, the court seemed to have contradicted this statement earlier in the opinion, writing that “in the case of a contemporary artist whose estate owns the reproduction rights to his or her works, the estate will have the right to preclude other authorities from publishing competing catalogues raisonné [sic] of the artist’s work” *Id.* at 97. I consider this to be a contradiction, because if the rights holders could forbid others from publishing competing catalogues, the art world’s surrender to the Foundation’s catalogue would not be wholly voluntary. The statement is curious because the only authority it cites is an essay by an antiquarian book dealer (Kraus, *supra* note 146), who in turn refers in general terms to the French and German courts. Additionally, the statement flies in the face of clearly established copyright law that publishing a collector’s guide, even with images copyright of which is held by another, is fair use. See, e.g., *Ty, Inc. v. Publications Intern. Ltd.*, 292 F.3d 512, 518-19 (7th Cir. 2002) (characterizing collector’s guides as “not derivative works” and therefore “sheltered by the fair-use defense.”).

190. 234 N.Y.S. 185 (Sup. Ct. 1929).

191. See, e.g., Michael A. Salzman, *Current Cases and Issues: A Roundtable Discussion*, 35 COLUM. J.L. & ARTS 419, 439 (2012).

192. See, e.g., *Kitchen v. Sothebys*, 18 Misc. 3d 1132(A) (N.Y. Civ. Ct. 2008) (“The plaintiff’s burden in proving the falsity of a statement concerning a work of art was described by the trial court in *Hahn* as ‘very heavy,’ a description that remains valid today.”).

following *Hahn* strike a deferential posture, imposing a high bar on plaintiffs seeking to convince the court that an expert has erred.¹⁹³

Judicial skepticism of courts' ability to evaluate authenticity and robust protections for expert opinions pose significant obstacles to plaintiffs. While these concerns pervade art authentication cases, they should not animate the antitrust standing inquiry. Whatever relevance they have to the merits, the question facing a court in determining whether a plaintiff should have standing relates to the injury alleged by the plaintiff and the plaintiff's relationship with the defendant, not the potential success of available affirmative defenses.

III. ARE ANTITRUST CLAIMS AGAINST ART AUTHENTICATORS A BUST?

Having surveyed the legal doctrine relevant to antitrust standing and the relevant features of the art market, we turn to the crucial question of how courts ought to evaluate antitrust standing in cases against arbiters of the authenticity of art. In the course of examining the standing tests available to courts, this Note will highlight the problems associated with the consumer-or-competitor test, both in its usual form and as it was applied in *Simon-Whelan*. Simon-Whelan had two central claims: (1) that the Warhol Board wrongly denied authenticity to genuine works by Warhol in the market, meaning that the price Simon-Whelan paid for a silk-screened self-portrait by Warhol was higher than the price he would have paid in a competitive market;¹⁹⁴ and (2) that Simon-Whelan could not sell his stock at fair market value because the Board unjustifiably denied authenticity to this silk-screened portrait.¹⁹⁵ The plaintiff was granted standing as a would-be competitor in the market for selling Warhols. He was denied standing as a purchaser of Warhol's art.

A. EVALUATING OPTIONS ON THE ANTITRUST STANDING MENU

1. The Consumer-or-Competitor Test

Under the consumer-or-competitor test, a buyer or seller of art will generally have antitrust standing to sue art authenticators, provided the plaintiff defines the relevant market convincingly and participates directly in it. If the *Simon-Whelan* court had applied the consumer-or-competitor test correctly, the plaintiff would have been granted antitrust standing as a consumer in the relevant market—that for the art of Andy Warhol.¹⁹⁶

193. See, e.g., *Krahmer v. Christie's Inc.*, 911 A.2d 399, 406 (Del. Ch. 2006) ("Christie's adhered to prevailing business practices in the auction house market when it attributed the painting . . ."); *id.* at 406 n.27 ("[I]t would stretch reason to expect Christie's to spend thousands of dollars and hundreds of employee hours researching a \$35,000 painting.").

194. Amended Class Action Complaint, *supra* note 4, at ¶ 196.

195. *Id.* at ¶¶ 20-21.

196. *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, 1:07-cv-6423 (LTS), 2009 WL 1457177 at *6 (S.D.N.Y. May 26, 2009) (discussing geographic and product market).

Unfortunately, if courts aim to vindicate the policy concerns that animated the Supreme Court in *AGC*, especially that of avoiding the risk of duplicative recovery against defendants,¹⁹⁷ the consumer-or-competitor test risks being overinclusive. Virtually anyone who buys or sells artwork is a consumer or competitor in a relevant product market, and virtually anyone who intends to sell art can be considered a “would-be competitor.”¹⁹⁸ Because a work of art may change hands several times, there will be a high risk of duplicative recovery against art authenticators if a court holds that consumers or competitors generally have antitrust standing against them.

The risk of multiple recoveries is that each link in the chain of custody of a work of art is a consumer in the market for that art. Normally, the risk of multiple viable plaintiffs for the same violation is avoided by the *Illinois Brick–Hanover Shoe* doctrine, discussed above in Part I.B.2.b, which prohibits indirect purchasers from suing antitrust violators. However, the chain of custody in the art market is not comparable to a typical supply chain in, for example, the automobile market. The producer is the artist; the first purchaser (if the artwork is transferred by purchase) is the direct purchaser from the artist; all subsequent purchasers are indirect purchasers from the artist and direct purchasers from whoever preceded them in the chain. But the art authenticator is absent from the chain of custody: no one is a direct or indirect purchaser from the art authenticator. Although *Hanover Shoe* prevents the authenticator from raising a passing-on defense, *Illinois Brick* does not shield the authenticator from multiple liability. *Illinois Brick* dealt only with indirect purchasers from defendants. If the board does not sell art, the plaintiff is not an indirect purchaser from the board.¹⁹⁹

It could conceivably be argued that the consumer-or-competitor test is a proxy for the efficient enforcer test and that, notwithstanding *Simon-Whelan*’s examination of whether the plaintiff was a consumer who purchased the defendant’s products, the case at least attempted to follow Second Circuit doctrine on antitrust standing. Commentators and courts have argued that consumers and competitors are the most efficient enforcers of the antitrust laws and that a plaintiff’s status as a consumer or competitor should be dispositive, or at least very important, in determining whether the plaintiff has antitrust standing.²⁰⁰ However,

197. See, e.g., *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 530 (1983) (“The legislative history of the section shows that Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets.”); *Id.* at 543-44 (discussing prior cases that “have stressed the importance of avoiding . . . the risk of duplicate recoveries”).

198. *Simon-Whelan* noted that the Second Circuit has recognized the possibility that would-be competitors can have standing to sue in antitrust. See *Simon-Whelan*, 2009 WL 1457177 at *6 (citing *Daniel v. American Bd. of Emergency Medicine*, 428 F.3d 408, 439 (2d Cir. 2005)).

199. See *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968) (in which the court denied the availability of a passing-on defense to all defendants). Although contemporary commentators viewed *Illinois Brick* as a “mirror image” of *Hanover Shoe*, Landes & Posner, *supra* note 75, at 603, the Supreme Court has restricted *Illinois Brick* to actual indirect purchasers without altering the scope of *Hanover Shoe*. See *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 478 (1982).

200. See *E. Auto Distributors, Inc. v. Peugeot Motors of Am., Inc.*, 573 F. Supp. 943, 947 (E.D.

the consumer-or-competitor test does not stand in well for the factors regularly considered by the Second Circuit, at least in the art market and other markets without the supply chains typical of manufactured goods. The Second Circuit seeks to “avoid duplicative recoveries.”²⁰¹ Making consumer-or-competitor status the touchstone of antitrust standing risks duplicative recovery in the art market, where the limitation on suits by indirect purchasers is irrelevant.²⁰²

2. Plaintiffs’ Antitrust Standing Under *Simon-Whelan*

The *Simon-Whelan* court applied the wrong antitrust standing test incorrectly. The court held that Simon-Whelan had standing as a would-be competitor in the market for the art of Andy Warhol, but that he lacked standing as a purchaser because he did not purchase the painting that was denied authenticity from any of the defendants.²⁰³ Although the court did not explicitly state that it was applying the consumer-or-competitor test, this seems to be a fair reading of the decision. The test was wrong as a matter of doctrine because the Southern District of New York is within the jurisdiction of the Second Circuit,²⁰⁴ which does not follow the consumer-or-competitor test.²⁰⁵ The application of the consumer aspect of the test was also flawed because the proper inquiry in courts where that test is employed is whether or not the plaintiff is a consumer in the relevant product market, rather than a consumer of the defendant’s products.²⁰⁶

If future courts follow *Simon-Whelan*, successful plaintiffs would have to be sellers of art (i.e., in competition with other sellers in the market for modern art) or consumers of authentication boards. The latter situation is rare, because most boards do not sell artwork. Indeed, the Warhol Board was only assumed to sell art because Simon-Whelan alleged collusion between the Foundation and the Board—an allegation the court was forced to accept for the purpose of the defendant’s

Va. 1983) (adopting argument that section 4 does limit standing to those plaintiffs who are efficient enforcers of antitrust laws and concluding, “[w]e must be extremely cautious in granting a person who is neither a consumer nor a competitor the right to treble damages as a private attorney general.”); Stephen J. Horvath III, *Standing of the Terminated Employee Under Section 4 of the Clayton Act*, 25 WM. & MARY L. REV. 341, 367 (1983) (“Consumers and competitors are the appropriate antitrust plaintiffs, therefore, because their treble damage actions are a greater deterrent to parties who undertake anticompetitive activities.”); Nat Stern & Kevin B. Getzendanner, *Gauging the Impact of Associated General Contractors on Antitrust Standing Under Section 4 of the Clayton Act*, 20 U.C. DAVIS L. REV. 159, 170 (1986) (“The [AGC] Court implied that a plaintiff who is not injured in her capacity as a consumer or competitor in the relevant market must overcome a substantial presumption against standing.”).

201. Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 443 (2d Cir. 2005).

202. See *supra*, Part III.A.1.

203. Simon-Whelan v. Andy Warhol Found. for the Visual Arts, 1:07-cv-6423 (LTS), 2009 WL 1457177, at *20 (S.D.N.Y. May 26, 2009).

204. 28 U.S.C. § 41 (2013).

205. See *supra*, Part I.B.3.c.

206. See, e.g., Ostrofe v. H.S. Crocker Co., Inc., 740 F.2d 739, 749 (9th Cir. 1984) (Kennedy, J., dissenting) (“Ostrofe was not a competitor or consumer in the market affected by the price-fixing conspiracy . . .”).

motion to dismiss.²⁰⁷ The *Simon-Whelan* test excludes a large number of potentially injured plaintiffs—consumers of art who do not sell what they own, for example, donors entitled to a tax deduction—from being able to assert antitrust claims. For this reason courts facing similar facts should not follow this case.

3. Majority Approach

The *AGC* factors are problematic both because they are indeterminate and because, when applied in an art authentication context, they do not properly account for the risk of duplicative recovery.²⁰⁸ To understand the difficulties of the majority approach, let us apply the test to the facts as alleged by Simon-Whelan.

(1) *Causal connection*. The causal connections between the antitrust violation and the injury in both Simon-Whelan's monopolization claim and his market restraint claim were direct: the alleged violation of denying the silkscreen's authenticity was a but-for cause of Simon-Whelan's inability to sell it, and in fact it was the only cause of any injury the plaintiff suffered.

(2) *Improper motive*. Simon-Whelan alleged an improper motive, accusing the defendants of "provid[ing] a façade of non-profit corporate credibility that obscures a deeply corrupt enterprise that enables defendants to reap financial and reputational benefit from Warhol's art and legacy."²⁰⁹

(3) *The nature of the plaintiff's alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws ("antitrust injury")*. This factor is particularly difficult to apply because the Supreme Court does not specify the proper level of generality that courts should use to inquire into Congress's intent with regards to the antitrust laws. One clear goal of antitrust law is protecting competition.²¹⁰ If the Warhol Board's determination of authenticity and its opaque authentication practices had increased information costs in the market for Warhol's art, thereby making it harder for art dealers to compete with one another, Simon-Whelan's suit could be viewed as vindicating this goal.

At a lower level of generality, it cannot be argued that Congress was specifically concerned with art authentication practices when it passed the Sherman Act. In Simon-Whelan's complaint, he claimed that the Warhol Board's determination artificially lowered the market value of his silkscreen. Lost profits have been held to be actionable in antitrust,²¹¹ and the fact that a restraint lowered prices is no defense to a per se violation of the antitrust laws.²¹² But this factor probably does weigh against Simon-Whelan's argument, since price *inflation* is the prototypical example of harm that Congress sought to curtail.²¹³

207. See *Simon-Whelan*, 2009 WL 1457177 at *6.

208. See *supra* Part I.B.3.a.

209. Amended Class Action Complaint, *supra* note 4, at ¶ 9.

210. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

211. *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961).

212. See, e.g., *Fashion Originators' Guild of Am. v. Fed. Trade Comm'n*, 312 U.S. 457, 467 (1941) ("[A] monopoly contrary to their policies can exist even though a combination may temporarily or even permanently reduce the price of the articles manufactured or sold.").

213. See *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*,

(4) *The directness with which the alleged market restraint caused the asserted injury.* This factor is analytically indistinct from factor (1). The market restraints of the Foundation's domination of the Board (the section 2 claim) and the entities' collusion (the section 1 claim) that led to the wrongful denial of authenticity would have caused the injury directly in Simon-Whelan's case, because it is the only factor leading to the artificially affected prices in the art market.

(5) *The speculative nature of the damages.* This factor would likely support Simon-Whelan's antitrust standing, since he alleged that a buyer was interested in purchasing his painting for \$2,000,000. Therefore, assuming that claim could be substantiated, the measure of his compensatory damages would have been \$2,000,000 less Simon-Whelan's purchase price (i.e., the value to him of the painting that he still owns).²¹⁴

(6) *The risk of duplicative recovery or complex apportionment of damages.* If courts do not allow a passing-on defense in a case like *Simon-Whelan*, there is a high risk of duplicative recovery from defendants in the case of an authenticated work of art that changes hands a number of times before a board declares it to be inauthentic. Every buyer in the chain of possession—which is not the supply chain envisioned by *Illinois Brick*—would have a claim against the board.

The indeterminacy of the antitrust injury factor will be a problem no matter what standing inquiry is applied, since antitrust injury is required in every circuit.²¹⁵ The problem that is peculiar to the *AGC* approach, and resolved by the Second Circuit's test,²¹⁶ is that risk of duplicative recovery is not adequately addressed. In the *AGC* test, the risk of duplicative recovery depends on whether the *Illinois Brick* bar is applicable to the facts of the case. But *Illinois Brick* has been narrowed by subsequent case law, so that it only applies to purchasers in a supply chain.²¹⁷ At the same time, *Hanover Shoe* unambiguously denies all defendants the ability to assert a passing-on defense. So if injuries have been passed on in a context other than a traditional supply chain, there is a risk of duplicative recovery against defendants. In *Simon-Whelan* and other art authentication situations, *Illinois Brick* is too narrow to keep plaintiffs out of court, and plaintiffs can invoke the broad language of *Hanover Shoe* to prevent any defense that plaintiffs passed on the antitrust injury.

4. Efficient Enforcer Test²¹⁸

The Second and Ninth Circuits look to the following factors in determining whether a plaintiff has antitrust standing:

- (1) the directness or indirectness of the asserted injury; (2) the existence of an

459 U.S. 519, 530 (1983).

Amended Class Action Complaint, *supra* note 4, at ¶ 230.

215. See *supra* note 56.

216. See *infra* Part III.A.4.

217. See *infra* Part I.B.2.c.

218. Recall from Part I.B.3.c that the Second Circuit's efficient enforcer test and the Ninth Circuit's injury test are functionally equivalent.

identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.²¹⁹

The only factor here not treated above in Part III.A.3 is the second, which is somewhat awkwardly phrased. Courts ask whether a plaintiff has economic self-interest in antitrust enforcement, and if so, whether a class of persons exists with *more* self-interest in enforcement.²²⁰ This factor makes the inquiry superior to the *AGC* test, because it skirts the problem of *Illinois Brick*'s narrowness and *Hanover Shoe*'s breadth: a purchaser who has passed on losses is not an efficient enforcer of the antitrust laws because there is another potential plaintiff with greater economic self-interest in seeing the law enforced, namely, the person who has not passed losses on to anyone. In other words, because art is not sold along a traditional supply chain, *Illinois Brick* would not prohibit purchasers of art from suing authenticators. *Hanover Shoe* might not allow a defendant to raise a passing-on defense, but the Second Circuit's inquiry into the existence of other potential plaintiffs effectively allows courts to bar claims by plaintiffs looking for the windfall of passed-on injuries plus treble damages. Outside the art context, the Second Circuit's efficient enforcer test does not skirt *Hanover Shoe* in the same way because the direct purchaser is the *only* potential plaintiff, even if it has passed on its damages, thanks to *Illinois Brick*. But in the context where the potential plaintiffs are not indirect purchasers of the art authenticator defendants, the Second Circuit's test avoids the problem of *Illinois Brick* and *Hanover Shoe* and properly focuses on what party is most motivated to enforce the antitrust laws. It is therefore the preferable inquiry for determining standing in art authentication antitrust cases.

In art authentication cases, the Second Circuit's efficient enforcer test will also address the key questions for antitrust standing from an economic point of view. Determining whether a potential plaintiff would be an efficient enforcer of the law, as that term is used in law-and-economics literature, depends on the answer to three questions: (1) What are the information costs of the plaintiff's lawsuit? (2) Does granting a given plaintiff standing risk duplicative recovery against a defendant? And (3) what does the effect of granting or denying standing have on the aggregate incentive to enforce the antitrust laws?²²¹

By and large, art authentication claims will carry far lower information costs than the claims that have led scholars to argue for, and courts to impose, standing barriers.²²² Unlike nationwide markets for substitutable low cost products, which

219. *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 443 (2d Cir. 2005).

220. *Id.* at 444.

221. See Landes & Posner, *supra* note 75; see also *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 474 (1982) (discussing duplicative recovery), and Richman & Murray, *supra* note 74, at 7 (2007).

222. For example, Simon-Whelan knew precisely how much profit he lost by not being able to sell his silkscreen, while economists disagree over whether or not members of a supply chain even suffer distinct injuries from one another as a result of an upstream violation of the antitrust laws. See *supra* note 134.

come to consumers at the end of a long and complicated supply chain, most works of art are unique and sold by one legal entity to another at a discrete moment in time. The risk of duplicative recovery is more effectively addressed in the Second Circuit than in the circuits that apply the *AGC* test, and the aggregate effect on the incentive to enforce the antitrust laws is the one factor in the Second Circuit's analysis that does not appear in courts applying the *AGC* test.²²³

B. INSTITUTIONAL COMPETENCE

This final section examines the institutional competence of courts to determine authenticity, a hurdle raised by scholars, market participants and some courts themselves. This section argues that courts have the competence and duty to decide such cases even if they present difficult facts.

American courts may not be able to make authenticity determinations that the art market will accept as authoritative, but that is not what they are asked to do in an antitrust case. Rather, the courts must determine whether defendants colluded or monopolized a market in an unreasonable restraint of trade.²²⁴ To the extent that the court's authenticity determination matters, it only goes to whether or not there is a violation of the antitrust laws and to the extent of damages, an evaluation that courts are familiar with and well positioned to undertake. Indeed, judges must frequently educate themselves about unfamiliar topics in order to reach a judgment on the merits of a legal claim. Courts need to evaluate matters of fact and law that are sometimes outside of judges' particular areas of expertise. To take just one example, Federal Circuit judges rarely publish articles in peer-reviewed scientific journals, but it does not follow that a federal court is incompetent to decide patent cases that require resolving debatable points relating to the obviousness of a given scientific discovery.²²⁵

Despite having produced volumes of cases that turn on sophisticated scientific analyses, courts are urged not to hear art authentication cases. Part of this argument is that it is very hard to adduce enough evidence to compel a court to declare a contested work authentic, and "a finding that the plaintiffs failed to meet their burden of proof implicitly vindicates the defendant."²²⁶ This conclusion is bizarre, since a denial to hear a case also vindicates the defendant. Given the American rule

223. The effect on the incentive to enforce is covered in the second factor of the Second Circuit's test. See, e.g., *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 443 (2d Cir. 2005) (considering "the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement" as a factor).

224. Cf. Jane Levine, *Current Cases and Issues: A Roundtable Discussion*, 35 COLUM. J.L. & ARTS 419, 436 (2012) (noting that in criminal fraud cases related to allegedly forged art, the burden on the government is to prove the elements of fraud beyond a reasonable doubt, which may or may not require proving authenticity in a given case).

225. See generally *Aventis Pharma Deutschland GmbH v. Lupin, Ltd.*, 499 F.3d 1293 (Fed. Cir. 2007) (analyzing whether the drugs captopril and enalapril obviously foreshadowed the discovery of ramipril).

226. See Butt, *supra* note 123, at 82. Butt does not clarify how, procedurally, courts are urged to dismiss the case. Possibly they are meant to declare that, as a matter of law, no quantum of proof of authenticity can meet some hypothetical burden on the plaintiff.

that each party bears its own costs of litigation,²²⁷ an early dismissal by virtue of institutional incompetence would constitute a greater victory for defendants than a final verdict in their favor, by saving them the costs of trial.

The conclusion that courts are institutionally incapable of deciding legal disputes because the underlying facts involve a determination on the authenticity of art is a non sequitur. Regardless of the difficulty of making factual determinations, courts have a duty to adjudicate disputes properly before them. The esotericism of a particular subject is no reason to depart from the well established principle that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”²²⁸ When authentication boards violate antitrust laws, they cause economic harm, and the courts have both the institutional competence and the institutional duty to allow proper cases to proceed in court.

CONCLUSION

Trusted authenticators wield tremendous power in the market for modern art. Their market power exposes them to potential antitrust liability. Because there is relatively little—though increasing—litigation in the art market, each reported case relevant to art authentication takes on an outsized significance. In the context of antitrust standing, courts should resist the temptation to follow *Simon-Whelan*’s erroneous analysis. The antitrust standing approach in *Simon-Whelan* was wrong as a matter of doctrine and policy. Doctrine within the Second Circuit (where art authentication cases tend to arise) and policy properly counsel courts to inquire which plaintiff is an efficient enforcer of the antitrust laws and to grant antitrust standing to that plaintiff. Finally, courts are the appropriate, and indeed the only, fora for the litigation of antitrust claims against arbiters of art authenticity.

227. See, e.g., *Arcambel v. Wiseman*, 3 U.S. 306, 306 (1796). (“The general practice of the United States is in opposition to [awards of attorneys’ fees] . . .”).

228. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).